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Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 16

WILLIAM J. ROPER, PETITIONER,

vs.

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 25, 1960
CERTIORARI GRANTED JANUARY 23, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 546

WILLIAM J. ROPER, PETITIONER,

vs.

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

CAPTION

United States of America,
Eastern District of Virginia, to-wit:

At a regular term of the United States District Court for the Eastern District of Virginia, held at the Court Room in the Court House and Post Office Building, in the City of Norfolk, Virginia on the First Monday in November, being the 3rd day of the same month, in the year of our Lord One Thousand Nine Hundred and fifty-eight.

Present: The Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia.

Among other was the following proceedings, to-wit:

In Admiralty No. 7818

WILLIAM J. ROPER, Libellant,

vs.

UNITED STATES OF AMERICA, Respondent.

UNITED STATES OF AMERICA, Petitioner,

vs.

CONTINENTAL GRAIN COMPANY, Respondent-Impleaded.

CONTINENTAL GRAIN COMPANY, Petitioner,

vs.

JOHN W. MCGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES, Respondent-Impleaded.

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

In Admiralty No. 7818

WILLIAM J. ROPER, Libellant,

v.

UNITED STATES OF AMERICA, Respondent.

LIBEL—Filed March 27, 1957

To the Honorable Walter E. Hoffman, United States District Judge:

The libel and complaint of William J. Roper against the United States of America, in personam, in a cause of action, civil and maritime, for damages for personal injuries, alleges upon information and belief as follows:

1. Libellant files this libel against the respondent pursuant to Title 46 U. S. C. A. Sec. 741 et seq., commonly known as the Suits in Admiralty Act, against the United States.

2. That the libellant is a longshoreman resident within the Eastern District of Virginia, and on October 2, 1956 was in the employ of Atlantic and Gulf Grain Stevedoring Associates;

3. That the steamship HARRY LANE on October 2, 1956 was owned by the respondent, United States and was being sailed as a cargo carrier;

4. That on October 2, 1956, pursuant to his employment, the libellant was in No. 3 hold of the steamship HARRY LANE, which was docked at the Grain Elevator Piers, Norfolk, Virginia, engaging in work of loading grain in said hold;

5. That pursuant to said work in unloading grain, a grain shoveler sometimes known as a "marine leg" was used in said work, said piece of equipment laying in said hold and being used to transfer grain from ship to elevator and vice versa; that said marine leg or grain shoveler was owned by Norfolk & Western Railway Company, leased by it to Continental Grain Company, who in turn leased same to Atlantic and Gulf Grain Stevedoring Associates, libellant's employer; that on the lip of said grain shoveler were two blocks and tackle on either edge, which assisted in the operation of the shoveler; that during the course of the operation of said shoveler, suddenly without warning to the [fol. 3] libellant, the block or pulley block broke in two with such force that a piece of said block struck libellant in his face and head, rendering him unconscious and causing him serious, painful and permanent injuries; that libellant was immediately taken to the hospital, where he remained under medical attention for a long period of time and underwent five different operations to his face and head, he having sustained compound fractures of the bones in his face, nose, broken teeth, and other injuries about his face and head;

6. That said block on said equipment was old, worn out, unfit for service, unsafe and unseaworthy in every respect, as a result of which libellant sustained his injuries; that in addition to the unseaworthiness of said block used on said vessel of the respondent, libellant's injuries were further caused and contributed to by the negligence and wrongdoing on the part of the respondent, its agents, its charterers, the officers and members of crew of said vessel;

7. That the respondent under applicable law did warrant the seaworthiness and safeness of the said vessel HARRY LANE, its equipment, appliances, the equipment and appliances brought aboard said vessel by others and used in the service of said vessel, and by reason of the breach of said warranty which was owed by the respondent to the libellant, said libellant sustained his injuries.

8. That said injuries sustained by the libellant by reason of the unseaworthiness of said block, the breach of warranty owed him by the respondent, constituted a maritime tort cognizable in admiralty and within the admiralty and maritime jurisdiction of this Honorable Court.

9. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court;

10. That libellant is entitled to damages by reason of the wrongs of the respondent and seeks judgment against the respondent in the sum of $75,000.00 as general damages for his injuries and losses sustained.

Wherefore libellant prays that this Honorable Court may enter judgment in personam against the respondent in the sum of $75,000.00, and shall allow such other and [fol. 4] further relief to him as in the nature of his case may be just.

William J. Roper, By Sidney H. Kelsey, As proctor under the rule.

Sidney H. Kelsey, Attorney at Law, 600 Citizens Bank Building, Norfolk, Virginia, Proctor for Libellant.

Duly sworn to by Sidney H. Kelsey, jurat omitted in printing.

[fol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

In Admiralty No. 7818

[Title omitted]

ANSWER—Filed May 31, 1957

The respondent United States of America, in answer to the libel filed against it by William J. Roper in the above-entitled matter, alleges upon information and belief as follows:

1. As to paragraph number 1, no answer is necessary, save that respondent respectfully leaves the question of jurisdiction for the determination of this Honorable Court.

2. As to paragraph number 2, respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and accordingly denies the same and demands strict proof thereof.

3. As to paragraph number 3, respondent admits the allegations thereof.

4. As to paragraph number 4, respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and accordingly denies the same and demands strict proof thereof.

5. As to paragraph number 5, respondent denies each and every allegation contained therein, save that respondent admits and alleges that the grain shoveler described therein [fol. 10] was not a part of the equipment of the SS HARRY LANE, but rather was a part of a grain discharge conveyor permanently located on the grain elevator pier, and that respondent's servants, agents, or employees exercised no control or supervision over the condition, maintenance, or use of the said grain shoveler or grain discharge conveyor.

6. As to paragraph number 6, respondent denies each and every allegation contained therein.

7. As to paragraph number 7, respondent denies each and every allegation contained therein.

8. As to paragraph number 8, respondent denies each and every allegation contained therein.

9. As to paragraph number 9, respondent denies that the premises are true, and respectfully leaves the question of jurisdiction for the determination of this Honorable Court.

10. As to paragraph number 10, respondent denies each and every allegation contained therein.

Wherefore, the respondent United States of America prays that the libel herein be dismissed; and that it recover costs; and for such further relief as to the Court may seem just in the premises.

L. S. Parsons, Jr., United States Attorney.

Certificate of service (omitted in printing).

[fol. 76] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Admiralty No. 7818

WILLIAM J. ROPER, Libellant,

v.

UNITED STATES OF AMERICA, Respondent.

UNITED STATES OF AMERICA, Petitioner,

v.

CONTINENTAL GRAIN COMPANY, Respondent-Impleaded.

CONTINENTAL GRAIN COMPANY, Petitioner,

v.

JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INCORPORATED, trading as ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES, Respondent-Impleaded.

OPINION—February 26, 1959

The crucial question in this case is whether the warranty of seaworthiness, extended to a longshoreman working aboard a vessel while loading or unloading cargo under the doctrine enunciated in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is applicable where the vessel being unloaded is dead and deactivated, but is being used by the Government for surplus grain storage. The Government contracts with a General Agent for certain services with respect to dead and deactivated vessels and, if the ship is merely used as a part of the grain storage program, the General Agent merely receives custody of the vessel, appoints a riding master, places linemen aboard, arranges for stevedoring services to attend the vessel on arrival at the grain elevator for the purpose of cleaning and pre-

paring for the receipt of grain, provides the cleaning gang, supplies watchmen, mooring lines, fire extinguishers and fire hoses. The General Agent does not assume the responsibility of arranging for stevedoring services to load or unload the grain. Vessels are also assigned to a General Agent for the purpose of deactivation or where it is necessary to send the ships to a yard for repairs. The Maritime Commission requires documented seamen to handle the lines.

Libellant, a longshoreman employed by Atlantic and Gulf [fol. 77] Grain Stevedoring Associates, was injured on October 2, 1956, while engaged in discharging grain from a hatch of the SS HARRY LANE, a vessel owned by the United States. Continental Grain Company had contracted with the Government to unload the vessel and, in turn, had employed Atlantic and Gulf for necessary stevedoring services. The equipment in use at the time in question was owned and maintained by Continental. Attached to the loading pier of the grain elevator leased and maintained by Continental is a marine leg, the mouth of which is lowered into the hold of the vessel by a Continental employee in the control house of the equipment as directed by the stevedores. The motors of the leg run an endless conveyor belt with buckets which scoop up the grain, carrying it to the elevators. After the grain is unloaded to a certain depth, it is necessary to use grain shovels to remove the balance of the grain in the hold and cause it to be placed in the mouth of the leg. The shovels are rigged off each of the four corners of the mouth of the leg and consist of large flat wooden boards, with handles like a plow, and to the front of the shovel is attached a rope which runs to and through a block attached to a padeye at the corner near the mouth of the leg. The rope or line runs up the side of the leg through other blocks to a drum at the top of the leg. The line slacks off when the longshoreman operator walks the plow to the corner of the hold, but, when he is ready to plow the grain to the leg, another longshoreman standing by the leg pulls the clutch rope. The clutch so engaged permits the drum to wind the plow rope and pulls the plow to the mouth of the leg. As the grain is gradually removed from the hold, the block on each corner is moved to the

lower padeye (there being two padeyes on each corner), the lower padeye being 12″ to 18″ from the bottom of the leg, and the other being from 18″ to 24″ above the lower padeye. A 10″ block on the corner of the leg broke due to defective bushings causing too great a play in the wheel; the strap was cut and the block struck libellant who was, at the time, instructing a longshoreman as to the procedure to follow in using the plow or scoop.

The evidence is insufficient to convict libellant of any contributory negligence. The defect in the block admittedly could not be ascertained from a visual inspection. As the equipment was owned and maintained by Continental, it manifestly was not incumbent upon the United States, [fol. 78] Atlantic and Gulf, or the longshoremen, to take each block apart in order to ascertain whether it had been subjected to unusual wear. The responsibility for such inspection, if any, rested upon Continental, who occasionally used the marine leg and its blocks for the purpose of unloading barges and bay boats without the assistance of the expert stevedore. For reasons stated herein, we do not reach the determination of Continental's liability as a respondent impleaded. The Court finds, however, that the United States, Atlantic and Gulf, and the libellant were guilty of no negligence contributing to the accident.

The SS HARRY LANE became a member of the James River Reserve Fleet, commonly referred to as the "moth ball fleet", in December, 1945. She was immediately deactivated which included, among others, the removal of perishables, inflammables, and nautical instruments. Her pipes and machinery were drained and her rudder, tail shaft, and propeller were firmly secured to prevent turning. Admittedly it would have required a major overhaul to reactivate the vessel, but the evidence discloses that some few vessels have been restored to service. There are approximately 360 vessels in the James River Fleet and none are certificated or licensed to operate as a vessel in navigation.

With the surplus of grain in this country, storage facilities were at a premium. The Commodity Credit Corporation entered into a contract with Continental to provide for the handling and servicing of this grain. In June, 1954,

the SS HARRY LANE was loaded with grain, the grain was removed at the time of libellant's accident in 1956, and the vessel was thereafter returned to the "dead fleet".

The evidence discloses that the SS HARRY LANE was placed under assignment to a General Agent on September 14, 1956, and withdrawn from the dead fleet for the purpose of discharging its cargo of 227,000 bushels of grain. When the grain is discharged from the vessel, it is graded and a warehouse receipt is issued to Commodity Credit Corporation.[1] It is then co-mingled with other grain of like class or grade. When the grain is loaded out of the elevator for the account of Commodity Credit, the receipts are cancelled [fol. 79] in order of age. Daily records are maintained by the elevator showing the stock or inventory of grain, by quality, held for the benefit of the Government. On occasions Continental purchases grain on hand from Commodity Credit, but generally Continental acts only as warehouseman holding the grain for eventual purposes of sale by Commodity Credit. Infrequently, the grain is sometimes taken from one of the vessels of the dead fleet for turning, screening, blowing and aerating and, after such conditioning process, is reloaded on the vessel. As to the SS HARRY LANE on the occasion in question, it is clear that the grain was taken to the elevator for the purpose of sale. It was, in that sense, a commercial venture.

Relying upon *Petterson* v. *Alaska Steamship Co.*, 9 Cir., 205 F. (2d) 478, affirmed *sub nom. Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States Lines*, 347 U. S. 984, libellant suggests that the shipowner is liable for unseaworthiness even though the breaking block was brought aboard the vessel by Continental as a part of its equipment and used by the stevedore. The United States insists that, under *Petterson*, the warranty of seaworthiness applies only to equipment commonly found as a part of the gear of the vessel and the stevedore, and not to a marine leg attached to the pier which is suspended over and partially lowered into the hold of the vessel. The more recent case of *Berryhill* v. *Pacific Far East Line, Inc.*, 9 Cir., 238 F. (2d) 385, cert. den. 354 U. S. 938, involved a

[1] The details of the grain program as administered by the Department of Agriculture may be found in C.F.R. 483.

claim for damages caused by a defective grinding wheel brought aboard the vessel by a machinist working for the shipyard. The Ninth Circuit, having previously ruled in favor of the injured party in *Petterson*, endeavored to distinguish the authorities and held that, since the repairs had nothing to do with loading or unloading the ship, the warranty of seaworthiness should not be extended beyond *Petterson*, *Sieracki*, and *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406. In the instant case, libellant was unquestionably injured during unloading operations by the defective condition of equipment not found aboard ship during navigation, but frequently used in the process of loading or unloading grain vessels. Cf. *Fredericks* v. *American Export Lines*, 2 Cir., 227 F. (2d) 450, 454. While it is doubtful that the [fol. 80] seaworthiness doctrine should be extended to include the marine leg, we find it unnecessary to determine this question and will assume, for the purpose of further discussion, that the shipowner warranted the seaworthiness of the marine leg if the vessel could be construed as being in navigation.

When the SS HARRY LANE was removed from the "dead fleet" to be towed to the grain elevator, it was in charge of a licensed master. The vessel had no power and was without such equipment as blocks, booms, etc. The master was employed by the General Agent, American Foreign Steamship Corporation, and was on call for the handling of grain ships. The Maritime Commission paid the bill for services rendered. The master maintained log entries from the time the vessel left the "dead fleet" until its return, but this log was not kept aboard the ship. There were six linemen, not signatory to any articles, employed through a contractor retained by the General Agent, who boarded the SS HARRY LANE while in the James River, and who accompanied the vessel to the grain elevator, remained aboard until she was secured to her berth, and then left the ship.

It is in this setting libellant urges that the SS HARRY LANE was in "navigation" and that the shipowner's warranty of seaworthiness must be extended to a longshoreman lawfully aboard the vessel during unloading operations. The Court is unable to agree. While not directly in point,

an analogy may be drawn to the absence of such warranty where the vessel has been withdrawn from navigation for long periods of time while repairs are in progress. *Raidy* v. *United States*, 153 F. Supp. 777, affirmed 4 Cir., 252 F. (2d) 117; *Berge* v. *National Bulk Carriers Corp.*, 2 Cir., 251 F. (2d) 717; *Union Carbide Corp.* v. *Goett*, 4 Cir., 256 F. (2d) 449.

In *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, decedent was employed as an operator of one of a fleet of motorboats carrying sightseers on a river during the summer months only. Decedent assisted in laying the boats up for the winter and his employment was then terminated. The following March decedent was reemployed and, in April, was killed by an explosion while helping to paint, clean, and waterproof the boats preparatory to navigation. [fol. 81] At the time, none of the boats was afloat, none had a captain or crew, and the work being performed was of the nature customarily done exclusively by shore-based personnel in the case of larger vessels. While the case does not discuss the warranty of seaworthiness as the action was instituted under the Jones Act, 46 U. S. C., §688, the decision turned on whether decedent was a "seaman" at the time of his death. In holding that decedent was not a "seaman" within the purview of the Jones Act, the court said:

> "The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter'. *Hawn* v. *American S. S. Co.*, 107 F. (2d) 999, 1000 (C. A. 2d Cir.); cf. *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779, 780 (C. A. 2d Cir.). In the words of the court in *Antus* v. *Interocean S. S. Co.*, 108 F. (2d) 185, 187 (C. A. 6th Cir.), where it was held that one who had been a member of a ship's crew and was injured while preparing it for winter quarters could not maintain a Jones Act suit for his injuries: 'The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature'."

Admittedly the Jones Act is inapplicable to this case as libellant was not an employee of respondent, but the theory

behind *Sieracki* is that the longshoreman is performing the work formerly reserved to the seaman and hence is entitled to the warranty of seaworthiness. In *Hawn* v. *American S. S. Co.*, 2 Cir., 107 F. (2d) 999, the vessel had been out of commission since November, 1937, when she brought a cargo of grain to Buffalo. In the spring of 1938, she was hauled by tugs to the outer harbor and anchored with only a shipkeeper aboard. Her classification was lost and could not be regained without a new inspection. During the summer months the vessel was not in use but, in October, the owners decided to use her for the storage of soya beans. A licensed master hired two tugs and caused the vessel to be shifted alongside a grain elevator, having employed six men to handle the lines. One of these men was injured during loading operations by catching his hand in a winch while warping the vessel back and forth along the wharf in order that the grain chutes could reach the ship's hatches. The accident occurred on November 15, 1938; loading operations were thereafter completed; but the vessel was [fol. 82] not taken away from the wharf until January, 1939, at which time another vessel took her place. The vessel on which plaintiff was injured was thereafter brought back to the wharf in February. It is freely recognized that *Hawn* was decided prior to *Sieracki* and, for this reason, a portion of the court's reasoning may be disregarded. On the subject of "navigation" the syllogism is still applicable and *Hawn* is cited with approval by the United States Supreme Court in *Desper* v. *Starved Rock Ferry Co.*, supra, a case decided after *Sieracki*. Referring to *Hawn*, it is said by the court:

> "As for navigation, it does not cease when the ship is in drydock for repairs, awaiting new business. *Hunt* v. *United States*, D. C., 17 F. Supp. 578; aff. 2 Cir., 91 F. (2d) 1014. On the other hand she is withdrawn from navigation, if laid up for the winter with a shipkeeper. *Seneca W. G. Corp.* v. *McManigal*, 2 Cir., 65 F. (2d) 779, Cf. *Gonzales* v. *United States S. B. E. F. Corp.*, D. C., 3 F. (2d) 168. The case at bar is between these two; she was not to transport goods, but to store them in the stead of a grain elevator. True, she was to be moved in the sense that her position was to be changed; and if the decision of Judge Benedict in *The Joshua*

Leviness, Fed. Cas. No. 7549, means that movement for profit of any kind whatever is necessarily 'navigation' for all purposes, this movement was such. However, Judge Benedict was deciding a case under the navigation laws, and while we see no reason to challenge the result, we do not feel bound to apply it as a general principle to all situations. We think with the judge in the case at bar that this ship was withdrawn from navigation."

Our attention is directed to the recent case of *Butler* v. *Whiteman*, 356 U. S. 271, reversing and remanding *Harris* v. *Whiteman*, 5 Cir., 243 F. (2d) 563. The facts involved a "dead ship" (tug) made fast to a floating barge. Decedent was last seen alive engaged in the engine room cleaning the boilers preparatory to a Coast Guard inspection. In a proceeding under the Jones Act the judgment, as approved by the Circuit Court of Appeals, was for the defendant on a directed verdict. The Supreme Court reversed and remanded the cause for trial holding, among other questions, that petitioner's evidence presented an evidentiary basis for a jury finding as to whether or not the tug was in navigation. The court, as to this point, cited *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373, and *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. (2d) 991. The other grounds for the reversal are hardly pertinent.

[fol. 83] Manifestly the Supreme Court has determined that a factual question arises in ascertaining whether a ship is in navigation. This court, having expressed the opinion that the SS HARRY LANE was not in navigation, so finds as a matter of fact.

Analyzing the authorities cited by the Supreme Court in *Butler* v. *Whiteman*, supra, we find but little assistance from the *Senko* case. There the petitioner's duty was primarily to maintain the dredge during its anchorage and for its future trips. It was pointed out that petitioner would have a significant navigational function when the dredge was put in transit. The sole question presented was whether petitioner was a member of a crew at the time of his injury; a matter which the court said was for the jury. While the dredge was anchored to the shore at the time of the injury and during all the time petitioner worked for the dredge

owner, and it is admitted that the dredge, like most dredges, was not frequently in transit, nevertheless the dredge was readily capable of transit and had not been removed from navigation as had the SS HARRY LANE.

Carumbo v. *Cape Cod S. S. Co.*, supra, also cited by the Supreme Court, is more in point. An excursion vessel ran between Boston and Provincetown during the summer season. At the beginning and end of each season it was customary for some of the men to work in the engine room, either preparatory to sailing or to laying up for the winter. When the vessel tied up at Boston at the end of the 1940 season, plaintiff, employed as an oiler during the summer season, requested his discharge but was told that he was being kept on in the event the ship was taken over by the Government. In fact, all the engine room personnel were retained. The accident occurred shortly after the close of the summer season. In holding that the injured man was a seaman and member of the crew, as well as determining that the vessel was in navigation, the court said as to this latter point:

> "There remains to be defined the word 'navigation'. It has been held that a ship is not in navigation if there is no present hope or intention of having her go to sea and if it would take a long time to put her in shape for an ocean voyage. *Gonzales* v. *United States Shipping Board*, supra. A ship is in navigation, however, when it returns from a voyage and is taken to dry dock to undergo repairs preparatory to making another trip. [fol. 84] *Hunt* v. *United States*, supra; *Hawn* v. *American S. S. Co.*, supra. It is our opinion that a ship is in navigation, although docked, if it remains in readiness for another voyage. It need not be under contract."

Applying these principles to the SS HARRY LANE, it is clear that she was not in "navigation" in the legal and factual sense. It is argued that such a ruling would exonerate a vessel in this category from the responsibilities of any collision while being towed from the "dead fleet" to the dock. On the contrary, a ship may be considered in navigation for the purpose of applying navigation laws, but not in navigation for the purpose of determining the

shipowner's liability for injury to persons claiming the rights of a seaman.

The recent decision in *West* v. *United States*, 3 Cir., 256 F. (2d) 571, presents a situation substantially identical with the existing controversy. The vessel, after World War II, was put in "moth balls" at Norfolk. During the Korean conflict it was decided to reactivate her and she was towed from Norfolk to Chester, Pennsylvania, and from Chester brought up and tied alongside a pier in Philadelphia. Atlantic Port Contractors had full charge of the work of reactivation. Libellant, an engineer employed by Atlantic, was injured when a metal plug came out of an overhead water pipe when a co-employee turned on the water without warning. While the status of the libellant, West, is different from that of the libellant, Roper, a longshoreman, the principle involving the status of the vessels is essentially the same, where the Third Circuit said:

> "We do not think that the 'MARY AUSTIN' at the time of this accident was a ship in navigation. . . .
>
> "Counsel for the libelant insists that anything floating on the water is in navigation although he concedes that an uncompleted vessel just launched is not in navigation. See *Franke* v. *Bethlehem-Fairfield Shipyard, Inc.*, 132 F. (2d) 634 (4th Cir. 1942). But cf. *United States* v. *Lindgren*, 28 F. (2d) 725 (4th Cir. 1928)."

After referring to *Desper* v. *Starved Rock Ferry Co.*, supra, the opinion continues:

> "We think the reason which controls here is that the vessel was out of service as a ship fully and as completely as a vessel which has just been launched but which is not yet ready for service as a ship. . . . It is not as though the 'MARY AUSTIN' had finished a voyage and was having repair work done before re- [fol. 85] suming business again. This ship had been laid up for some time and had to be thoroughly rehabilitated before getting back to service. She had no crew, contrary to argument made by libelant. There were employees of the United States on the ship. They had signed no articles and they were there not as a

ship's crew but as inspectors on behalf of the United States to see that the work was done in accordance with the contract."

Libellant, in his brief, relies upon *Halecki* v. *United New York & New Jersey S. H. P. Ass'n.*, 2 Cir., 251 F. (2d) 708, a case decided by the Second Circuit on the same day as *Berge* v. *National Bulk Carriers Corp.*, supra. On February 24, 1959, the Supreme Court of the United States reversed *Halecki sub nom. United Pilots Ass'n.* v. *Halecki*, —— U. S. ——. In short, *Halecki* as it now is interpreted by the highest court carries with it the clear implication that the libellant herein "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed". The operation of a marine leg, while concededly a part of the discharging operation, requires the services of the expert stevedore trained in the use of such equipment. The doctrine of escape from liability for unseaworthiness by delegating to others work traditionally done by members of the crew has been substantially clarified in *Halecki* by limiting such liability to those who did the "type of work" traditionally done by seamen, and were thus related to the ship in the same way as seamen "who had been or were about to go on a voyage". When we consider the nature of the duties being performed by libellant, the type of equipment in use, the owner's lack of control over discharge operations, the vessel's removal from navigation, and the limited use of the ship for storage purposes, the conclusion is inescapable that the warranty of seaworthiness does not apply in such circumstances. It differs from a barge, dredge or floating crane which is in use or contemplated use at all times. Seaworthiness contemplates a vessel which will, in due time, be used for the purposes of navigation—not a ship which was once used for such purpose and is now adopted as a substitute for a warehouse which requires occasional towage to the mainland for servicing or sale of its cargo.

This Court is not unmindful of the fact that the storage [fol. 86] and subsequent sale of grain constitutes a commercial endeavor but this fact, standing alone, does not place a vessel in navigation. *Hawn* v. *American S. S. Co.*, supra, controls this phase of the case and has been cited with

approval by the Supreme Court in *Desper* v. *Starved Rock Ferry Co.*, supra. The mere use of a vessel for the storage of grain which, of necessity, requires that the ship be taken occasionally to the grain elevator for the purpose of discharging the grain, does not place in navigation that which has been removed from navigation.

Proctors for the United States will prepare an appropriate decree dismissing the libel with costs. This opinion is adopted by the Court in lieu of specific findings of fact and conclusions of law in accordance with General Admiralty Rule 46½. Present decree after endorsement by proctor for libellant.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia
February 26, 1959

[fol. 87] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Admiralty No. 7818

WILLIAM J. ROPER, Libelant,

v.

UNITED STATES OF AMERICA, Respondent,

v.

CONTINENTAL GRAIN CO., Respondent-Impleaded,

v.

JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., trading as ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES, Respondent-Impleaded.

FINAL DECREE—May 14, 1959

And now to wit this 14th day of May, 1959, in accordance with the opinion which is hereby adopted by this Court as

its Findings of Fact and Conclusions of Law in accordance with General Admiralty Rule 46½ filed February 26, 1959, it is

Ordered, Adjudged and Decreed that judgment, with costs, is hereby entered in favor of respondent, the United States of America, and against libelant, William J. Roper.

And further, in view of the opinion of the Court rendering unnecessary the decision as to the issues between the United States of America and Continental Grain Company, respondent impleaded, and, in turn, the issues between Con- [fol. 88] tinental Grain Company and John W. McGrath Corporation and Arrow Steamship Agency, Incorporated, t/a Atlantic and Gulf Grain Stevedoring Associates, respondent impleaded, it is hereby Adjudged, Ordered and Decreed that impleading petitions of the United States of America and of the Continental Grain Company be and the same are hereby dismissed without prejudice to the rights of the United States of America and/or Continental Grain Company to proceed further by way of indemnity in the event this decree is reversed or otherwise modified.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia

Submitted by Proctors for Respondent:

John M. Hollis, United States Attorney, Norfolk, Virginia.

Alan Raywid, Attorney, Admiralty & Shipping Section, Department of Justice, Washington 25, D.C.

Sidney H. Kelsey, Norfolk, Virginia, Proctor for Libelant.

Jack E. Greer, Norfolk, Virginia, Proctor for Respondent-Impleaded, Continental Grain Co.

William B. Eley, Norfolk, Virginia, Proctor for Respondent-Impleaded, Atlantic and Gulf Stevedoring Associates.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

In Admiralty No. 7818

WILLIAM J. ROPER, Libellant,

v.

UNITED STATES OF AMERICA, Respondent.

UNITED STATES OF AMERICA, Petitioner,

v.

CONTINENTAL GRAIN COMPANY, Third Party Respondent.

CONTINENTAL GRAIN COMPANY, Petitioner,

v.

JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INCORPORATED t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES, Third Party Respondents.

Transcript of Trial Proceedings

[fol. 2]

Norfolk, Virginia
March 22, 1958

Before: Honorable Walter E. Hoffman, United States District Judge.

APPEARANCES:

Sidney H. Kelsey, Esq., Proctor for Libellant, 903 Royster Building, Norfolk, Virginia, and: L. David Lindauer, Esq., of Counsel.

Alan Raywid, Esq., Assistant United States Attorney, John M. Hollis, Esq., Assistant United States Attorney, For the United States of America, Respondent.

Williams, Cocke, Worrell & Kelly, Esqs., Proctors for Continental Grain Company, Third Party Respondent and Petitioner, 322 Citizens Bank Building, Norfolk, Virginia, By: Jack E. Greer, Esq., of Counsel.

Rixey & Rixey, Esqs., Proctors for John W. McGrath Corporation, Arrow Steamship Agency, Incorporated t/a Atlantic and Gulf Grain Stevedoring Associates, Third Party Respondents, 401 Citizens Bank Building, Norfolk, Virginia, By: William B. Eley, Esq., of Counsel.

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[fol. 13] WILLIAM J. ROPER, called as a witness by and on his own behalf, having been duly sworn, testified as follows:

Direct examination.

By Mr. Kelsey:

• • • • • • •

[fol. 14] Q. Mr. Roper, you were employed by the Atlantic and Gulf Stevedores on October 3, 1956; is that not correct, sir?

A. I believe it was the 2nd.

Q. October 2nd, 1956; is that correct?

A. That's right.

Q. Pursuant to your employment by the Atlantic and Gulf Stevedores, were you performing duties on the vessel [fol. 15] HARRY LANE—

A. Yes.

Q. —which is owned by the United States of America?

A. Yes.

Q. Is that correct, sir?

A. That's right.

Q. What were your duties, Mr. Roper?

A. To discharge the grain from the Government ship.

Q. Discharge the grain from the Government ship. What hold were you working in at the time of your injuries?

A. Working in No. 3 hatch.

Q. Will you describe what kind and type of vessel the HARRY LANE is to the Court?

A. It is a liberty ship, five hatch.

Q. What was this ship loaded with and where had it come from?

A. It was loaded with wheat—I don't know exactly what type—and it come from the James Fleet, James River Fleet.

Q. This was storage wheat—

A. Storage.

Q. —is that correct?

A. That's right.

Q. Did this vessel have a captain on it?

A. Yes, it did.

[fol. 16] Q. And by whom was the captain employed?

A. He was employed, I believe, by the Government.

Q. Did the captain of the HARRY LANE have command or give orders on the ship?

A. Yes, he was in charge of the ship, the captain.

Q. The captain was in charge of the ship?

A. That's right.

Q. Mr. Roper, would you, as a stevedore on a ship, be subject to the captain's orders with reference to any safety precautions on the ship?

A. Yes.

Q. Speak louder.

A. Yes.

Q. You recognize the captain's authority, then; is that correct—

A. That's correct.

Q. —regarding the ship?

A. Regarding the ship.

• • • • • • •

[fol. 21] Direct examination.

By Mr. Kelsey:

Q. Mr. Roper, I think I was asking you about the captain of the vessel, his situation. What was the captain's duty on the HARRY LANE, the Government captain's duty with [fol. 22] reference to the ship? What did he have to do—

A. Well—

Q. —so far as safety is concerned, now?

A. He was just—the captain, I mean, if anything was wrong, he would tell me to correct it.

Q. Tell you?

A. That's right.

Q. Did he have any duties—inspection of the equipment of the vessel or any duties regarding what equipment was brought aboard? Do you know whether he did any inspection or not?

A. I don't know.

Mr. Hollis: Which question are you asking, Mr. Kelsey?

Mr. Kelsey: He says he does not know.

Mr. Hollis: Oh.

By Mr. Kelsey:

Q. You do not know of any inspection he made with reference to the marine leg, do you?

A. No.

Q. Mr. Roper, I have some pictures and I would like for you to explain to the Court how this marine leg works. I hand you Libellant's Exhibit 3-J, and if you would take the picture and show the Judge what this picture represents.

The Court: I will come down.

[fol. 23] Mr. Kelsey: Sir?

The Court: I will come down.

A. This is the leg itself (indicating).

The Court: Speak up, please, so that everybody can hear you.

A. This is the leg itself that is lowered down to the ship. It is in the hold. This is the clutches which operates the plow or the shovel which take the grain to the leg—and to discharge it, and it comes up through here and goes down the elevator for storage (indicating).

Q. I hand you Libellant's Exhibit 3-B, and ask you to tell the Court what that represents?

A. This is the leg itself down in the hold discharging the grain. That's not using the shovels. That's just down in the grain by itself.

By the Court:

Q. And the grain is a mass?

A. That's right. You can see the grain all on the sides. When this leg gets down to the bottom, and the grain, it's still high on the sides, you hook your blocks to them padeyes and you take your shovels, and you got ropes coming down, and they go up. You pull the clutch and it brings the shovel to the leg.

Q. Does the grain get out of the hold of the ship by pressure; is that—

[fol. 24] A. No, it's got here—

By Mr. Kelsey:

Q. I hand you Libellant's Exhibit 3-G, and it shows the bottom of the leg.

A. They have buckets which are on a belt that rotate.

By the Court:

Q. Within the leg itself?

A. Within the leg itself. You can see the bucket. They dip in the grain—

Q. And they constantly go up on a belt—

A. That's right.

Q. —and go over the side and dump into a belt on the other side?

A. That's right.

By Mr. Kelsey:

Q. I hand you Libellant's Exhibit 3-C, and ask you to explain what that rope is hanging beside the leg and what that is used for?

A. This is the clutch rope which engages the clutch, what I showed you in the other photograph, to move the plow to the leg. When you pull this rope, it engages the clutch and when you release it, it disengages it.

Q. Will you point out to the Court where the shackle, which has been introduced in evidence, is attached? I mean [fol. 25] the block.

A. The block?

Q. The block is attached to.

A. The block was attached to this cleat right here (indicating).

Q. Now, is there a cleat on the other side?

A. There is also one here, one here, and one here (indicating).

By the Court:

Q. There are two cleats on each side—

A. Each corner.

Q. —at the bottom of that leg?

A. That's right.

By Mr. Kelsey:

Q. Where does this rope, which goes through this block, go? Which side of this exhibit does that go to?

A. This goes through here (indicating).

Q. This goes to the bottom?

A. That's right.

Q. What goes through this block?

A. The rope goes through here (indicating).

Q. And where does that rope come from?

A. It comes from the clutch.

Q. Point it out on the picture.

A. It goes up the leg to another block similar to this, [fol. 26] to the clutch (indicating).

Q. And this fits into this cleat down here; is that correct?

A. That's correct.

Q. Where does the rope go after it goes through this block?

A. It goes to the shovel.

Q. It goes through here and it comes out where, to the shovel?

A. The shovel.

Q. And that is attached similar to this; is that correct?

A. That's right.

Q. I hand you Libellant's Exhibit 3-H. Is this the scoop or shovel?

A. Yes, that's the scoop.

Q. Where do the lines go to coming from this block we have got here?

A. From the line, you have a chain which is called a bridle. It hooks in these hooks and it hooks onto the shovel.

Q. All right. Now, you have a bridle that comes from here and that line comes into this—

A. That's right.

Q. —this block; is that correct?

[fol. 27] A. That's correct.

Mr. Hollis: Which line? Are you talking about two lines or one?

By Mr. Kelsey:

Q. There is one line; is that correct?

A. That's correct.

Mr. Hollis: I thought he said the clutch line went through that pulley.

By Mr. Kelsey:

Q. Which line do you mean?

A. Well, that's the clutch line that pulls the shovel.

Q. The clutch line pulls the shovel?

Mr. Hollis: The clutch line goes through that block?

The Witness: Yes, that's right.

By Mr. Kelsey:

Q. Now, the man stands behind this with his hands attached to these two braces here; is that correct?

A. That's correct.

Q. And when it is operated he is standing behind it and this scapes the bottom of the hold of the ship, does it not—

A. Yes.

Q. —to bring the grain up to the bottom of the marine leg; is that correct, Mr. Roper?

[fol. 28] A. That's correct.

Q. The object is to bring the rest of it that is in the corners up to here so it can be taken up?

A. That's right.

Q. So it is similar to a plow, is it not—

A. It is.

Q. —with the clutch pulling the grain to here (indicating) so it can be taken up?

A. That's right.

Q. Is that the operation that you were doing at the time?

A. That is the operation.

• • • • • • •

[fol. 69] By Mr. Kelsey:

Q. Mr. Roper, you have explained to us how this block connects up to the bottom of the leg. What I would like to do is to get you to tell us, first, when this equipment, the marine leg, was lowered into the No. 3 hold and when it began its work, did you make any inspection or did you look at the equipment, from a safety viewpoint, to see whether the gear and equipment was safe, so far as you could see?

A. Yes, I did.

Q. You did?

A. I did.

Q. Is that your practice?

A. That's my practice.

Q. Is that the practice of the stevedore, to look and see if it is apparently safe?

A. That's correct.

Q. Did you look at the bottom of the leg? Did the block and the leg itself look apparently safe, so far as you could see?

A. It did.

• • • • • • •

[fol. 76] Q. Do you know who put the marine leg aboard the ship at the time of your injury?

A. An employee of Continental Grain.

Q. The employee of Continental Grain—

A. That's right.

Q. Put it aboard the ship?

A. That's correct.

Q. Do you know who owns the block that struck you?

[fol. 77] A. I think Continental Grain owns the block.

Q. The block is not furnished by the stevedore, is it?
A. No.
Q. The marine leg is not furnished by the stevedore, is it?
A. No.
Q. The operation of the marine leg, for you to operate the scoop or the plow, where does the marine leg have to rest regarding the vessel?
A. The marine leg has to rest on the deck in order to use the plow.
Q. It has to rest on the deck of the vessel?
A. That's right, on the bottom.
Q. On the bottom of the vessel?
A. That's right.
Q. Was it laying on the bottom of the vessel when you were trying to show the longshoreman how to use the plow—
A. That's right.
Q. —at the time you were injured?
A. That's right.
Q. Is that correct?
A. That's right.

• • • • • • •

[fol. 78] Cross examination.

By Mr. Raywid:

Q. Mr. Roper, when you first began your testimony you said there was a captain aboard the ship; is that right?
A. That's correct.
Q. And you said the captain was responsible for the safety of the equipment and that you were responsible to him?
A. That's correct.
Q. So when you came aboard the ship you immediately reported to the captain, did you not?
A. Well, I reported to the watchman. They have a watchman that signs in on the ship.
Q. They have a captain and a watchman. Do they have anybody else?
A. Not that I know of, no.
Q. Then you reported to the watchman?
A. That's correct.

Q. Did you ask the watchman to notify the captain that you were aboard?

A. No.

Q. But the captain is responsible for your safety and you are responsible to the captain; is that right?

A. I believe that's the way it is, yes.

Q. Did you notify the watchman what you were bringing aboard, whom you were bringing aboard?

[fol. 79] A. Notified the men I was bringing aboard, not what I was bringing aboard.

Q. Did you notify him what equipment was going to be brought aboard?

A. No.

Q. So the captain—was the captain around at that time?

A. I don't remember.

Q. But you did not see him?

A. I don't think so. I don't remember.

Q. You did not talk to him?

A. I don't remember whether I talked to him that day or not. I forgot.

Q. But you realized all the time if the captain objected to the use of this equipment or if he thought it was unsafe that you would have to suspend your operation?

A. That's right.

Q. But you did not talk with him?

A. No.

Q. Nor did you show him the piece of equipment that you were going to use?

A. No.

Q. You say, Mr. Roper, that there was a captain aboard this ship and that he was responsible for the safety of the ship. How do you know that? How do you know there [fol. 80] was a captain aboard?

A. Well, by working those ships before.

Q. Oh, but you do not know—

A. And I have seen the captain on board before, yes.

Q. How do you know what his duties are?

A. Well, I load ships down the grain elevator too, and when I load a ship, if I get too much list in a ship, the captain requests that I get it out or either stop the operation of loading the ship.

Q. Does he ever inspect your equipment?

A. Not that I know of.

Q. And yet you know that it is part of his duties to inspect your equipment or he is responsible for the equipment that you use?

A. I think he is responsible for the ship and whatever goes on that ship, he is responsible for.

Q. What I am driving at, Mr. Roper, is, how do you know that that is part of his duties?

A. Well, he is the captain of the ship.

Q. And you just assume that it is—

A. For the safety of the ship, he shall be responsible, that's right.

Q. Have you ever been to sea?

A. No, sir.

Q. But you are familiar with the duties of a captain of [fol. 81] a ship?

A. I am that much familiar with it, yes.

Q. As regards your operation anyway, you know that is—now, you testified that there was a captain on the ship. Was there any crew aboard this ship?

A. No, just the crew that I brought aboard.

Q. No crew, but there was a captain?

A. Yes.

Q. A captain not of a crew, but a captain of a ship?

A. That's correct.

Q. Mr. Roper, what was your experience prior to this operation? How long have you worked the longshore?

A. Well, I have been working on the waterfront for about eight years.

Q. For about eight years?

A. Yes.

Q. Let's see. That would make you seventeen when you—

A. That's correct.

Q. What did you start as, what kind of work did you do?

A. Longshoreman.

Q. What does that entail?

A. That's dock work.

Q. Does it include grain work and this type of work? [fol. 82] A. It includes putting grain fittings in a ship.

Q. What do you mean by "grain fittings"?

A. Well, when you fit a ship for grain, you have to put shifting boards in the hold.

Q. But nothing mechanical of this type?

A. What do you mean?

Q. In this particular incident there was a grain elevator. You said you were experienced with grain fittings. They are not the same thing, are they, at all?

A. No, that's not the same as the leg, no.

Q. Any mechanical operation in that, any winches, pulleys, and so forth?

A. Yes, the ship's riggings.

Q. The ship's riggings?

A. That's right.

Q. This operation, you were the foreman; is that correct?

A. That's correct.

Q. How long have you been a foreman?

A. I don't remember how long I have been employed—as a foreman?

Q. That's right.

A. That's two and a half, three years, I guess. I'm not sure.

Q. Then this gang, this group of longshoremen, they are responsible to you?

[fol. 83] A. That's right.

Q. And they follow your orders?

A. That's right.

Q. And you, in a way, are responsible for them, their safety?

A. That's correct.

Q. Have you ever performed the individual functions of these men? I mean one of them pulls a line—

A. That's right.

Q. —one of them takes the slack—you performed each of these functions—

A. That's correct.

Q. —always in an executive capacity, so to speak—

A. That's right.

Q. —always directing?

A. That's right.

Q. How about yourself? Did you ever operate them

yourself, I mean, over a period of time gaining experience over them, or did you only direct their use?

A. Direct.

Q. You direct their use?

A. That's correct.

Q. In other words, when you started work at seventeen and the work you did up until the time you were a foreman, it was not these particular jobs that you were directing at [fol. 84] the time?

A. That's correct.

Q. Now, you stated, in the use of this equipment, I believe your words were, that the clutch line ran through the pulley?

A. Through the block.

Q. Through the block, into the bridle, to the plow; is that right?

A. That's correct.

Q. The clutch line, you call it?

A. That's right.

Q. And this was the only line?

A. Well, you have a line to operate the clutch.

Q. But the clutch line runs through the pulley, or through the block, to the bridle, to the shovel; is that correct?

A. That's correct.

Q. Now, what is the clutch line for? Let me rephrase that question. Does the clutch line start and stop the winch?

A. No, not that particular line.

Q. Then what do you call that line, the one that starts and engages the gear?

A. That would be a clutch line too, but that would be the one to cut it on and off. That's a small rope.

Q. That is engaged to the winch and that does not run [fol. 85] through any pulley or block, does it?

A. It runs through two small blocks. Yes, it does.

Q. But not the block in question?

A. No.

Q. So there are two lines, two clutch lines?

A. That's correct, on each clutch.

Q. But what about the line that ran through this pulley or this block here, is that also a clutch line?

A. That goes to the clutch. That's for pulling the plow to the leg.

Q. I am not too familiar with this marine leg, Mr. Roper, but in the operation of a car the clutch engages gears.

A. That's correct.

Q. Does this line that runs through this block engage a gear?

A. No, it goes around—it goes around the gear.

Q. It goes around the winch?

A. That's right.

Q. Why do you call it a clutch line? Does it have anything to do with a clutch?

A. It is on the clutch.

Q. Doesn't the line that runs through here go up the side of the marine leg and around a winch?

A. That's correct; that's the clutch. That's what we call the clutch.

[fol. 86] Q. Oh, you call the winch the clutch?

A. That's right.

Q. Well, that is my understanding, but the one that goes to engage the gears, you call that also a clutch line, but it is a different type of clutch?

A. That's correct.

Q. In this operation, Mr. Roper, how long was this operating before the accident happened?

A. Well, that happened a little after two in the afternoon. We had worked it that morning from eight until twelve and we knocked off at twelve to one and come back.

Q. You do not start off using the plows, do you? You try and empty—

A. We dig as far as we can with the leg itself.

Q. And then—

A. And then we use the plows.

Q. Did you just start using the plows at that time?

A. No, I think we used them before in No. 2 hatch.

Q. Had you just started using them in No. 3?

A. I don't remember, but I think we did. I think we just started in there just before noon.

Q. You just started?

A. I think so.

Q. Mr. Roper, are you usually down in the hold when this operation is going on?

[fol. 87] A. Not usually, no. I go down once in a while to check.

Q. To check to see that things are moving along?

A. That's correct.

Q. You usually go down there to start it off?

A. Yes, check the blocks.

Q. So they were just starting off this operation when you—just starting to use the plows?

A. We were using the plows in No. 3 hold, and when we come back at one o'clock, I went down into the hold with the men and I was instructing the men how to use the plow in a better way.

Q. But they had been using them before you started the instruction?

A. Yes, that's right.

Q. Well now, you stopped them to instruct them; is that right?

A. No, I didn't stop them. I took over.

Q. Well, it was just one continuous operation, a man stepped aside?

A. That's correct.

Q. What was wrong? What instruction was necessary?

A. Well, I was trying to show them a better way to walk in the grain pulling the plow; instead of turning around walking up the hill, to walk beside the plow.

[fol. 88] Q. It was not moving fast enough, then?

A. Not to suit me.

Q. Do you know whom you were instructing?

A. I believe the fellow's name was Mercer.

Q. How about your operation when you were working it? Was it smooth?

A. I would say so.

Q. Everything was going fine?

A. Yes.

Q. You were working the grain towards the—

A. That's correct.

Q. —base of the marine leg and then something went wrong?

A. That's correct.

Q. How does this plow work? Could you describe that?

A. Well, I have described it once. Do you want me to describe it again?

Q. Would you, please?

A. Yes. Could I leave the seat?

The Court: Yes, indeed.

A. Now, here's the leg (indicating).

By Mr. Raywid:

Q. You misunderstood me. I do not want you to go through this whole operation. I just want you to explain to me how the plow operator operates the plow.

A. Oh. Well, he stands behind the plow and has two [fol. 89] handles and he stands behind the plow, and when they engage the clutch, the plow sinks down in the grain and you hold it steady and it pulls it to the leg.

Q. What keeps the plow from just riding over the grain?

A. You hold it down.

Q. Oh, the man's weight?

A. That's right.

Q. The operator's weight. What keeps it from going down under the grain so that it would not—

A. The way you tilt the plow.

Q. Did I understand you to say a few questions ago that you wanted the men to stand on the side of it rather than behind it?

A. Walk up the grain on the side.

Q. What do you mean by that? I do not—

A. In other words, the plow has two handles, and instead of turning around after you get to the leg, instead of turning around and your back to the leg, in pulling it up the hill, get ahold of one handle and walk up beside the plow.

Q. I see. That was what they were doing wrong, then?

A. I wouldn't say it was wrong, but I would say it was a better way, the way I was trying to show them.

Q. That is taking the plow back away—

A. From the leg.

[fol. 90] Q. —from the leg?

A. That's correct.

Q. There is no tension on the block then, is there?

A. No.

Q. Then if you were demonstrating removing the block or removing the plow from the leg, why was there any tension on the block at all?

A. Well, I had to get down to the bottom of the leg.

Q. First you were walking it in?

A. That's right.

Q. And when you got in there you were going to show them how they could do it better by taking it back out?

A. That's correct.

Q. But it was a smooth operation? You did not slip, or fall, or stumble?

A. No.

Q. You say that you inspected the block prior to its use; is that right?

A. That's correct.

Q. What else did you inspect? Did you inspect the marine leg itself, the buckets and the—

A. Well, you can't see the buckets, with the exception at the bottom of the leg itself, you can see a couple of them.

Q. But you did inspect the plow?

[fol. 91] A. I did look at the blocks.

Q. I mean the block. What kind of inspection did you make? Did you turn it over? Did you—

A. I looked at the blocks. They appeared to be right, and the way—the most—they're supposed to be safety blocks, and the only thing I figured could be wrong was the shackle might turn loose and the pin might get loose and screw it in.

Q. So you checked the—

A. That's the main thing, yes.

Q. This particular block, that had been used for some time in your unloading because you unloaded a number of holds already; is that right?

A. That's correct.

• • • • • • •

[fol. 93] Q. You always inspect these blocks?

A. Yes.

Q. Do you know much about this block? Do you know much about the operation of blocks?

A. Well, I have been working with them for quite a while.

Q What kind of block is this?

A. That's a single sheave block.

Q. There are single sheave blocks of all types and

descriptions. Can you be more definite as to the description of that block?

A. No.

Q. What type of line do you use with that block?

A. Manila rope.

Q. What size?

A. I think it is one inch.

Q. What difference does it make as to the size?

[fol. 94] A. Well, I think that's a one-inch block.

Q. Then it would be—in the description of the block, you would call it a one-inch block?

A. For a one-inch rope, I think that's the way—

Q. In the construction of the block, what difference does it make as to the size of the rope?

A. The size of the pulley.

Q. In other words, this groove here?

A. That's right.

Q. If there was too big a line, it wouldn't fit through there?

A. That's right.

Q. If it was too small, it might jump off?

A. That's right.

Q. How about the diameter of this thing, does that make any difference?

A. It does make a difference, but I don't see where it would on this.

Q. What difference does it make?

A. Well, the bigger the wheel, the easier it is to pull.

Q. So then you could have had a larger wheel as long as the groove was the same?

A. You could have.

Q. So the diameter has nothing to do with the type of [fol. 95] line that you use?

A. I don't think so.

Q. As to this hold operation now, the grain elevator, I think you said that the Continental Grain Company's operator lowered it into the hold?

A. That's correct.

Q. Do you direct that operation?

A. Yes.

Q. Where do you stand?

A. On the deck.

Q. And you give him signals, do you?

A. Well, there is a man in the gang of men I have that gives him the signals.

Q. How do you get your plows down in the hold?

A. They are onto the leg.

Q. They are right on the leg?

A. They are on the side of the leg. You can slide them in.

Q. How about the blocks?

A. They can either be slid in the leg or attached.

Q. They can either be slid in or attached. How about in this situation, were they slid in or were they attached?

A. I believe they were attached.

• • • • • • •

[fol. 101] Cross examination.

By Mr. Greer:

Q. Do you recall, Mr. Roper, whether, on this particular occasion, the blocks were already on the padeyes on that leg or were they shoved in that space in between where you say you keep them—

A. I believe they already were attached to the leg.

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[fol. 107] Q. So there will not be any confusion, I will call that the clutch rope and I will call the rope which goes to the shovel just the shovel rope, in other words, the one that controls it. So, I take it, then, that your man would pull it back on the slack and then, of course, when the man, operating the clutch rope, would see that he was back in position with the grain, he would pull that rope which engaged the clutch; is that right?

A. That's correct.

Q. And that would, of course, tighten up the shovel rope which would pull the shovel in with the man guiding it?

A. That's correct.

Q. Of course, that operation was entirely in the hold and that was done entirely by the longshoremen under you?

A. With the exception of the clutch don't run unless the elevator man turns them on.

Q. That is what I mean. We have gotten the marine leg down into the hold. You have signaled him to turn it on, [fol. 108] use his buckets, and the motor is running?

A. Yes, but the clutch is individual from the leg itself.

Q. The clutch controlling these winches—I am trying to get it a little more accurate—shown here on 3-J, they are located up in this housing right under this house, are they not?

A. That's correct.

Q. And, as you previously described, without going into any further detail, the ropes from these winches run down through a pulley that is attached to the outside of this marine leg and then on down to the corners, as described. Now, of course, when you are ready to use these shovels, that is when you tell the man up in the house to turn the motors on so they will be running?

A. That's correct.

Q. All right. Which brings us back to where we were a minute ago, that with those motors running up there, then in the shoveling operation, the longshoreman down there pulling the rope is the one that controls whether the clutch is in or out and whether that winch is turning or not?

A. That's correct.

• • • • • • •

[fol. 113] Cross examination.

By Mr. Eley:

Q. You have testified that the normal procedure is, when you are using your plow, that the longshoremen will go back into one of the wings or one of the corners of the hold and, on a given signal, the longshoreman, who is at the [fol. 114] leg with the clutch rope, will pull the clutch rope down and then engage the winch?

A. That's correct.

Q. That then pulls the plow toward the leg?

A. Yes.

Q. And as you approach the bottom of the leg, he will then release it?

A. Yes.

Q. So that the clutch, of course, does not get fouled up with the leg?

A. That's correct.

Q. At this particular time of your accident had you reached the end of your walking with the plow?

A. I don't think so.

Q. Were you still walking at the time, do you recall?

A. Yes, I was walking. I had to be.

Q. Do you have any idea how far you were away from the marine leg at the time?

A. No, I don't know.

Q. But, to the best of your remembrance, you had not completed—

A. No, I hadn't completed, sir.

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[fol. 122]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The interrogatory: "State verbatim the exact log entries made on the SS HARRY LANE on October 2nd, 1956, or any other date, relating in any way to any injuries sustained by the libellant, or in lieu thereof attach a copy to the answer to this interrogatory."

Mr. Kelsey: The answer, Judge.

The Court: Yes, I have it.

Mr. Kelsey: The supplemental answer.

The Court: In the supplemental answers to the interrogatories the following answer appears: "Pertinent log entries made on the SS HARRY LANE on October 2nd, 1956:

"1440 hour William J. Roper, Ship foreman, for Atlantic and Gulf Stevedores was injured in #3 hold, the strap on a 10 inch gal—" —galvanized, it should be, G-A-L—"Iron block broke, striking him on the left side of the face about his left eye. He was removed from the hold by his longshoreman, an ambulance was called and a stretcher provided by the deck force. At 1445 he was landed on the dock as the ambulance arrived. The 10 inch block was attached [fol. 123] to the elevator leg as a leed block for blowing the grain to the leg. All work was stopped."

Mr. Kelsey: If your Honor please, we want to introduce into evidence libellant's interrogatory No. 15 and the answer.

The Court: Libellant's interrogatory 15 reads as follows: "State what examination, if any, was made by the respondent, its agents, representatives, etc., of the equipment being used to load grain aboard the SS HARRY LANE on October 2nd, 1956, giving the name of the person making such inspection, the equipment inspected, when such inspection was made, and the condition of the equipment discovered by such inspecting person."

And the answer to that interrogatory No. 15 reads as follows: "The equipment being used to load or unload grain was shorebased equipment which was not only owned or leased by libelant's employer, Atlantic and Gulf Stevedores, but was also in the custody, control and being operated by Atlantic and Gulf Stevedores. At this time respondent has no knowledge of the equipment having been inspected by any agent, servant or employee of respon-
[fol. 124] dent."

* * * * * * *

[fol. 129] PETER J. FRANTZEN, called as a witness by and on behalf of the respondent United States of America, having been duly sworn, testified as follows:

Direct examination.

By Mr. Raywid:

Q. Would you state your name, please.

A. Peter J. Frantzen.

Q. You are referred to as captain. What is your experi-
[fol. 130] ence?

A. Well, I have sailed as captain a good many years, since 1939.

Q. Do you hold some sort of a license?

A. I hold a license issued by the Coast Guard as master of any ocean.

Mr. Kelsey: Do you have this gentleman's address, please?

Mr. Raywid: I believe that is in the answers to the interrogatories.

By Mr. Raywid:

Q. But would you state your address, please?

A. 1610 Avenue S, Brooklyn, New York.

Q. Do you hold any other licenses, Captain Frantzen?

A. Well, there is several pilot licenses on my certificate.

Q. For what areas?

A. Oh, for Baltimore, Norfolk, Newport News, all in Puerto Rico, at Fort Lauderdale, Florida; Miami, Florida.

Q. How are you presently employed?

A. I am presently unemployed.

Q. Are you connected with any agency or—

A. Well, I have been working with American Foreign Steamship Corporation for the last fourteen years and I am working on grain ships through them as general agent.

[fol. 131] Q. Are you on call by them?

A. On call by them.

Q. Have you any experience with liberty ships?

A. I have been master of liberty ships since 1942.

Q. Have you done any work with dead, deactivated ships or those ships which are commonly known as ships of the moth ball fleet?

A. Yes, for the last three years I have been master on these deactivated ships, grain ships, also repair ships.

Q. You were aboard the SS HARRY LANE on the 2nd of October, 1956?

A. I was.

Q. And in what capacity were you aboard that ship?

A. As master.

Q. Is that full master or—

Mr. Kelsey: Just a moment, sir. I object to counsel leading. There is only one. He is master, and that is it.

The Court: Objection sustained.

By Mr. Raywid:

Q. You state that you were master of this ship. What did that entail?

A. That is shifting the ship from the moth ball fleet down to its discharging berth and securing the ship and looking out for the security of the ship.

[fol. 132] Q. Well now, not in reference to this particular ship, but you have been in command of a ship at sea, what does the master of a ship do at sea?

A. Well, the master of the ship runs the whole ship. He is "Little Lord." He is everything at sea.

Q. He is in complete charge of the ship?

A. He is in complete charge of the ship.

Q. And everybody on the ship?

A. And everybody on the ship.

Q. You just stated that on this ship you were in charge of shifting it from the James River Reserve Fleet to the grain elevator pier; is that right?

A. That's right.

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[fol. 133] Q. At this time of shifting were you assisted by any vessels?

A. I was assisted by towboats, because there are no power on the ship. We have no means of moving our own ship.

Q. Were you subject to any orders?

A. Subject to the orders of the pilot, the towboat captain, who is both towboat captain and pilot.

Q. You were subject—

A. He was in charge.

Q. You were subject to the orders of the tugboat captain?

A. Yes, he is in charge of the move from the Fleet down to the berth.

Q. Is that the usual procedure on board live vessels?

[fol. 134] A. Not on live vessels and the master is in charge at all times, but not on dead boats because he has no certificate or license to operate anywhere except enclosed waters and by being assisted by a towboat and a licensed pilot.

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The Court: Part of the surplus that is accumulated?

Mr. Kelsey: Yes, sir. They just use the ships to store [fol. 135] the grain up there.

The Witness: It's a storage bin, that's all.

By Mr. Raywid:

Q. What did you just say, Captain?

A. It's a storage bin.

Q. Your duties aboard this particular ship, what were they, specifically?

A. To supervise the shifting crew and seeing that the ship was properly secured at the dock and take soundings, look out for the safety of the ship. That's my duty there. Keep a record of what goes on aboard the ship.

Q. While the ship was alongside the pier, who was under your command, what men?

A. The only men that would be directly under my command would be laborers, if I called for laborers, and at that time, whenever the stevedores are working, there are six or eight laborers placed aboard to clean the cargo holds as they finish and tend the lines so that she keeps tied up securely at all times.

Q. Were those laborers seamen?

A. They don't have to be, as far as I am concerned.

Mr. Kelsey: If your Honor please, I object. That is a conclusion of law which the Court must draw.

[fol. 136] The Court: Objection sustained.

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By Mr. Raywid:

Q. You stated that they are used in the movement of a ship. How is the ship moved?

A. It's moved by towboats, but we have got to—if we move them from one dock to another we have to pull the lines in by hand on deck—those six men do that—and they pull them in tight by hand because there is no power on the ship to assist in any way.

[fol. 137] By the Court:

Q. Cacase, is he a stevedore?

A. He is a contractor. He is in the ship cleaning business. He cleans—he contracts to clean ships and help to fumigate.

By Mr. Raywid:

Q. What equipment do you have available for your use?

A. The only equipment we have is what's placed aboard after we come alongside the dock; that is, the six mooring lines, a heave line, six lengths of fire hose, which are hooked up right away, a ladder to come aboard and three CO_2 fire extinguishers, three safety lamps and about four to six cargo clusters—they are electric lights—and sounding rod for taking soundings of the hold to see if there is any water and a leadline for measuring the depth of the water around the ship. That's the extent of all the equipment that's placed at my disposal.

Q. Do you know whether that is brought aboard or is that ship's equipment?

A. No, that's brought aboard. That's sent—that's alongside the dock when we get there. The contractor brings it from W. O. S. A. warehouse and places it aboard the ship.

Q. You stated that you are familiar with dead vessels in general, because you have served as a master aboard [fol. 138] them on a number of occasions.

A. On a number of them, yes, sir—New York, Philadelphia, Baltimore, also Norfolk.

Q. Will you describe, in a general way, the condition of these ships?

A. The ships are absolutely dead, nothing, no material around.

Mr. Kelsey: I object, if your Honor please. He is making general reference. He should hold it to this vessel, and I ask that the examination be restricted to this vessel.

The Court: All right. Let the question be directed, then, to this vessel.

By Mr. Raywid:

Q. Captain Frantzen, what was the condition of this particular vessel at the time?

A. Well, you say "condition." There is all kinds of condition—physical condition; there's condition that are

mental—the ship itself was partly loaded with grain, about six thousand ton of grain in the lower hold, and it had been well-covered up and stored, and that's all I know.

Q. I am interested in the ship's equipment.

A. There was no equipment. All equipment has been taken down and put away and all perishable equipment and [fol. 139] combustible equipment has been taken off the ship before she is laid up.

Q. How about the booms?

A. The booms are stripped bare. They are laying naked. There is no equipment aloft at all—no blocks, no ropes, no wires.

Q. Captain, you stated that you had some equipment available for your use which was brought aboard?

A. That's right.

Q. Are you authorized to use any other equipment?

A. There is no other equipment. I am authorized to use any equipment that's available if I need it for the safety of the ship, like if there were any wires around and I need—a storm came up and I needed extra wires, but we call the W. O. S. A. for that, or the Maritime Commission to send them down, which they did on that ship. They sent us down six extra wires.

Q. Do you know whether this ship was under certificate?

A. A dead ship, she is not under certificate, no.

Q. Mr. Roper, who is the libellant in this case, did he report to you when he came aboard?

A. No, he did not.

Q. Did he talk with you at all?

A. I talked to him just before noon and I may have [fol. 140] talked to him right after lunch—just personally standing alongside of No. 3 hatch there by the after end, and I remember Mr. Roper. The next time I seen him, he was injured, laying down in the grain injured.

Q. Do you have any responsibility for his equipment?

Mr. Kelsey: I object to that. That is a question of law, sir.

The Court: Objection sustained.

By Mr. Raywid:

Q. Is it your practice, sir, to inspect the stevedoring equipment that comes aboard the ship?

A. No, it is not the practice of a master to inspect any stevedore equipment coming aboard the ship.

Mr. Kelsey: I object. I withdraw the objection.

The Court: Nothing wrong with that question.

Mr. Kelsey: It is probably a good answer, Judge.

Mr. Raywid: Maybe I should object.

By Mr. Raywid:

Q. Did you direct any orders or participate in any way in this unloading operation?

A. Not the actual unloading, because that's—the stevedore does the unloading. We just keep an eye out on [fol. 141] them, in case of bad weather, to see that they cover up the hatches, to see that they don't damage the grain with rain, and that's about all, as far as the cargo is concerned.

Q. Did you have any orders from your general agents or from the Government, or anybody else, to inspect this equipment?

A. No. You are referring to the equipment as used in discharging?

Q. That is right.

A. No, we had no orders to inspect that.

Q. Now, Captain, you said you served on other vessels of this same Fleet; is that right?

A. That's right.

Q. Did you make any inspections on those occasions?

Mr. Kelsey: I object again as being irrelevant, what he did on any other vessels anywhere.

Mr. Raywid: Your Honor, this is very relevant. We are trying to establish what the deactivated vessels are, what they comprise and what the orders are.

Mr. Kelsey: If your Honor please—

The Court: Let Mr. Raywid finish.

Mr. Kelsey: I beg your pardon.

Mr. Raywid: And it is very pertinent to this case to [fol. 142] show just what requirements should be placed on a dead vessel. That is the entire case of the Government.

The Court: I think I am going to permit the evidence and reserve any ruling on it. I have never had one of these cases now involving a so-called dead vessel that the Government sees fit to use for live purposes. In substance, that is what they have done. They have taken a dead vessel that they say is no good to them, but they are using it for a live purpose. It is used for a live purpose when they move that vessel from the dead fleet up to a dock at that time. Now, whether that places it in a different category or not, I do not know what the law is, but I think we better let all of the evidence in on this subject as to what the practice is, what this gentleman knows, if he knows what the practice is, if he can remember the other vessels, and where they were, and so forth. However, let's not get too extensive on that score.

Mr. Raywid: Would you read the question, please.

[fol. 143] (The pending question was read.)

By Mr. Raywid:

Q. Do you understand the question, Captain? Did you make any inspections of—

A. Of what?

Q. —equipment on board other ships on the same operation—dead ships used for grain storage?

A. We had no equipment on the ships when we take them down from the Fleet. There is no equipment on the ship until she gets alongside the dock, and that's placed aboard.

By the Court:

Q. When you were serving on the live ships, did you make any inspection of the stevedoring equipment then?

A. On a live ship you have an organization. You have a chief officer who is in charge of all the gear and maintenance of the ship and he is responsible to the master

to report to him any deficiencies, anything that needs to be renewed.

Q. I realize that is true as to the ship's equipment, but—

A. That's right.

Q. —I am talking about the equipment that does not belong to the ship but is either used by a stevedoring concern or by someone else in connection with the loading and unloading operation.

[fol. 144] A. It is not inspected by anyone on a ship, but if he notices any deficiency, like something wrong or a shackle turned wrong, he will call their attention to it.

Q. I understand that.

A. And that's the only thing he is allowed to do.

By Mr. Raywid:

Q. Captain, I want to repeat a question. Did you inspect this particular marine leg or this particular block, first?

A. No.

Q. Did you inspect the marine leg?

A. No, only when it was lowered into the hold, that's all. I didn't give a formal inspection to go around and see if it needed maintenance, or anything. It's not my equipment. It doesn't belong to the ship and I have no authority to inspect it.

Q. Did you inspect the stiff leg?

A. That's what I'm talking about, the stiff leg and its equipment, I did not inspect it. I have no authority to. It doesn't belong to me or the ship.

Q. Did you inspect the winches on this marine leg?

A. Never even seen them. They are up aloft, so I wouldn't be able to see them.

Q. Did you inspect the cabin where it is operated from, the marine leg?

[fol. 145] A. No, I have no authority up there and I would have no authority to inspect it or suggest anything.

Q. Did you look at the belts that carry the grain from the ship to the elevator?

A. Never have.

Q. We have had some description here as to the opera-

tion of this marine leg. Would you tell us where it is located?

A. The leg itself is located at the mill. It is attached to the mill and the ship must be moved under it and the hatch that it's going to work in must be moved directly under and it is lowered into the hold right into the grain and it's a bucket affair which is on an endless belt which goes down and picks up the grain and deposits it on top on belts, I assume—which I am told, and that is the operation, as far as I am concerned.

Q. How is it lowered into the hold?

A. It has its own gear. It has block and falls, and it's lowered by machinery up in the elevator.

Q. One end is in the hold. Where is the other end?

A. One end is up there in the elevator. It's attached to the elevator.

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[fol. 147] Cross examination.

By Mr. Kelsey:

Q. Captain, you hold a master's license, all oceans?

A. Yes, sir.

Q. Unlimited tonnage?

A. Yes, sir. I have it in my pocket, if you wish to see it.

Q. No, sir, we accept your statement. Captain, you have been to sea many years and have been master of ships for many years. How long have you been employed by the Maritime Administration?

A. Well, I am employed by the general agent. I have been working for the Maritime through the general agent since—in this one stretch, since 1942.

Q. So you have been continuously employed by the Government?

A. Well, through the general agent. I am employed by the general agent, but the Maritime pays the bill.

Q. I see. The Maritime pays the bills, but you are employed by the general agent; is that right?

[fol. 148] A. Through the general agent, American Foreign Steamship Corporation.

Q. When these vessels are stored up in the James River Fleet, they are moth balled, so the term is used, which means that they are stripped of all perishable gear and they are insulated as much as possible against weather and wear; is that not right?

A. Yes, sir.

Q. Their engines are not removed, are they, Captain?

A. No, there could be some that have engines removed —parts of them.

Q. Isn't it the practice, and isn't it true, that many of the James River vessels, or laid up vessels, have been activated again?

A. Yes, sir.

Q. And they go back to sea again—

A. That's right.

Q. —is that right?

A. That's right.

Q. So the only purpose for putting these vessels up there is for the convenience of the Government to keep them there, since they are owned by the Government, and if they are then activated, then they are put in condition to go to sea with gear and equipment; is that not right, sir?

A. Not all of them. All of them can't be put to sea.

[fol. 149] Q. No. I mean those that are taken out—

A. Those that are taken out?

Q. Yes.

A. They are taken out for that purpose, and that's the policy of the Government. That's the purpose.

Q. So there is no difference between the HARRY LANE? It has not lost its identity as a vessel, has it, by being laid up in the James River Fleet?

A. Yes, it has lost all its identity as a vessel because it has no certificate or license aboard to operate as a ship.

Q. Disregarding the fact that it is not licensed, it has to be licensed in order to operate, it must have a certificate?

A. That's right.

Q. All right. However, if a certificate were provided in order for it to go back to sea, it has not lost its identity as a vessel, has it?

A. It has to qualify for the certificate first.

Q. I am assuming that it does qualify.

A. That's a lot of work.

Q. Well, you bring your equipment aboard—

A. That's right.

Q. —and there are many ships taken to the James [fol. 150] River Fleet—

A. Yes, sir.

Q. —that go back to sea again?

A. Yes, sir, and go back to the Fleet again.

Q. And go back to the Fleet, and come back. So, actually, as a steamship, it is still a vessel but inactivated; is that not right, sir?

A. No, I don't think you could use the word "vessel" again. Unless she's able to move by herself and has a license to move about freely, then you could use the word "vessel."

Q. Is a mudscow a vessel?

A. No, it's a scow.

Q. It is not a vessel; is that right, sir?

A. Well, it's not a vessel.

Q. Your definition of a "vessel" means that it has to have motor power; is that correct?

A. Well, it has to have some power. It could be wind, a motor.

Q. The HARRY LANE had her engines and was capable of power, was she not?

A. Not then, not then. The engines were apart, the appurtenances were apart.

Q. But she could be put back together, though?

A. Yes. It would take a lot of time.

Q. She was a vessel before—

[fol. 151] A. Yes.

Q. —your interpretation of the term—

A. That's right.

Q. —but she was not a vessel after because she did not have a license or certificate?

A. Didn't have a license or certificate.

Q. Now, Captain, you say you were the master of the SS HARRY LANE. It has a vessel's name, does it not?

A. It has.

Q. Steamship HARRY LANE?

A. It has.

Q. All right, you concede that. You told us you were the master; and that morning your duties were to look out for the safety of the ship?

A. That's right.

Q. So you refer to it as a ship also, do you not?

A. That's right.

Q. Do you regard it as being among your duties to see that the gear and equipment brought aboard this ship, the HARRY LANE, should be inspected by you in any way?

A. What are you referring to, ship's equipment?

Q. I am referring to, specifically, the marine leg, the shovel and blocks that are attached thereto.

A. That should be my duty to inspect it?

Q. Yes.

[fol. 152] A. No.

Q. Do you regard that as your duty?

A. No, I do not.

Q. So you do not inspect; is that correct?

A. I do not inspect that equipment.

Q. Would you regard it as part of your safety duties to see that that equipment is safe, it will not injure anything on the ship?

A. I said I was placed aboard the ship for the safety of the ship.

Q. Well, you—

A. To see that the ship was safely moored and a safe condition that she was not taking water or leaking to—or to a damage degree.

Q. You stated, also, that it was your duty to see that the hatches are covered up?

A. That's right.

Q. Is it your duty to see that the vessel does not sink?

A. What was that?

Q. Is it your duty to see that the vessel does not spring a leak and sink?

A. That's right.

Q. So you must do that inspection to ascertain that; is that right?

[fol. 153] A. I do that personally.

Q. All right. Now, you are speaking of the practice of the Government, are you not, in stating that you have received no orders of inspection? Is that not what you are speaking of?

A. I did not say that.

Q. What did you mean when you said you received no orders to do any inspection?

A. Whatever the question was, I answered it at the time.

Q. Have you ever received any orders from anyone to do any inspecting on the vessel?

A. On the vessel, but the question was inspect this equipment, I believe.

Q. Inspect the—

A. That's what the question was, and I said, no.

Q. And you do not consider that that is your duty?

A. That's right.

Mr. Kelsey: All right. That is all, sir.

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[fol. 154] Cross examination.

By Mr. Eley:

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Q. Now, if, perchance, the marine leg were put in the hold of your vessel while you were moored at the pier in such a way that you thought that it might endanger your ship, would you take any action in that case?

[fol. 155] A. I certainly would.

Q. What would you do then?

A. I would call it to the attention of the superintendent that he would have to rectify at once, or whatever possible it could be.

Q. If he did not rectify the situation, you would take such action, as you thought, to stop the loading?

A. Yes, sir, tell them to stop.

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Cross examination.

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[fol. 156] By Mr. Kelsey:

Q. Of course, there are passenger ships, too, that do not carry solely passengers, but that was what the HARRY LANE was doing, discharging cargo at that time, her grain cargo; is that not correct, sir?

A. I don't know if you could word it that way, that the HARRY LANE was discharging. The HARRY LANE was not discharging the cargo. She had the cargo in there. That leg was discharging the cargo. That was lifting it out of the ship. No ship's gear was involved, so the ship could not really, say, technically the ship was involved.

Q. All ships nowadays, longshoremen unload ships, do they not?

A. Mostly. Very few places they don't.

Q. Foreign places?

A. I just loaded one up in the Aleutians. There was no stevedore there.

[fol. 157] Q. But, generally, the job has been taken over in the United States—

A. Yes.

Q. —and in other countries that the stevedore unloads and loads?

A. That's right.

Q. That is taking one of the things that historically was the job of seamen up until the Eighteenth Century—

A. That's correct.

Q. —or Nineteenth Century; is that correct?

A. That's correct.

• • • • • • •

Redirect examination.

By Mr. Raywid:

Q. When you left the James River, were you aboard alone or—

A. No, I had about six linemen, shifting crew.

Q. They came aboard with you?

A. They came aboard with me.

Q. And they stayed with you until what time?

A. They were there handling the lines and towboats [fol. 158] and secure the ship when we got down and bring that equipment, safety equipment, aboard the ship, and then we would dismiss them.

Q. When did they leave?

A. It's in the log book. As soon as the ship was secured and the fire hose hooked up, they left the ship.

Q. And they left?

A. They left.

Q. How many men?

A. I think it was six men.

Q. Those are not the same men as the laborers you spoke of, are they?

A. They could be, because when the stevedore starts, why, the contractor puts six men aboard the ship for the master's use to keep the lines tied and keep the ship secured.

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[fol. 161] RALPH DE WOLFE, called as a witness by and on behalf of the respondent United States of America, having been duly sworn, testified as follows:

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Direct examination.

By Mr. Raywid:

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[fol. 168] Q. Do you know of any supplemental orders affecting the receipt or storage of grain on board the SS HARRY LANE or the discharge of grain on board the SS HARRY LANE?

A. Yes, there is general supplemental agreements, not only pertaining to the SS HARRY LANE, but all of the storage boats.

Q. That is what I speak of.

A. Yes, however, we do issue an individual order for discharging each individual ship, and in the case of the HARRY LANE, there was such an order issued.

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[fol. 182] JAMES F. WISE, called as a witness by and on behalf of the Respondent United States of America, having been duly sworn, testified as follows:

Direct examination.

By Mr. Raywid:

Q. Mr. Wise, would you state your full name, please.
A. James F. Wise.
Q. What is your address?
A. 5558 Woodbine Road, Norfolk, Virginia.
Q. Who is your employer, Mr. Wise?
A. Maritime Administration, Norfolk.
Q. What is your title? What is your job?
A. I serve in a dual capacity. I am the area representative and the chief of the ship repair and maintenance branch of the Hampton Roads section. That section has jurisdiction over Maritime Administration owned and operated vessels from Norfolk, Virginia, to Key West, Florida, on the Atlantic coast.
Q. How long have you been in the capacity of an area [fol. 183] representative?
A. Since July 1954.
Q. How long have you held the position of chief of the ship repair and maintenance branch?
A. July 1946.
Q. What are your duties as an area representative for the Maritime Administration?
A. Well, principal coordination of the movement of vessels in the area, including those in and out of the reserve fleets, the supplying of equipment or approval of requisitions for supplies, coordinating tug movements, moving the ships, and other administrative duties.
Q. Does that call for anything to do with reactivation or deactivation of ships?
A. Yes, both. When ships are nominated for either reactivation or deactivation, they must be moved to a shipyard or vice versa, from the shipyard to the fleet, after the deactivation work is done.
Q. What are your duties in connection with your other job as chief of ship repair and maintenance branch?

A. To direct and supervise activities in connection with the survey of vessels to determine their physical condition, preparation of specifications for repairs, awarding repair contracts, inspection of the work in progress to insure that it is properly done and complies with the requirements [fol. 184] of the various regulatory bodies—Coast Guard, American Bureau of Shipping, Public Health, and others.

Q. Mr. Wise, what is your background that qualifies you for this job, or these two jobs?

A. Well, just about all my working life I have been engaged in shipping in some manner—since I left high school, at Maury High. I started going to sea in 1917 and in 1922 I received my first license as an engineer. In 1926 I was licensed as chief engineer and I served on that license from shortly after that time until 1941, when I come ashore to work for the Maritime Administration. At that time I started as marine surveyor, and after approximately nine months I was promoted to assistant chief of the ship repair and maintenance branch.

Q. That is the capacity that you are now holding as chief?

A. That is—in 1946 I was again promoted to chief of that branch.

Q. I see. Now, Mr. Wise, in your job and experience, would you tell us what the deactivation of a vessel entails?

A. Well, to begin with, a vessel coming in to be deactivated, no longer required in active service, perishables and consumable stores are first removed to prevent spoilage, and along with that, we remove all materials of an inflammable nature—paints and canvas, cloths, rope—to [fol. 185] reduce the hazard of fire after they are in the fleet. We also take off valuable nautical instruments that are small enough in size to be readily pilfered. The piping, machinery, the boilers, is all drained to prevent frost damage from freezing. The overboard discharges and sea substance are blanked off, then filled with heavy grease to prevent freezing. The machinery, the piping, is subsequently flushed with a preservative oil to arrest corrosion while the vessel is laid up. The smokestacks would be covered with a wooden cover; that, in turn, covered with canvas, tar paper, to prevent the access of moisture down

there. The cargo gear is stripped; the booms are down-rigged and the booms are lowered to the sockets. The wire, heavy lift blocks, similar material, is placed down below in the 'tween decks. The smaller equipment is placed in storerooms that are then sealed to prevent pilferage of the material.

Q. What is done to the steering gear?

A. Well, the steering gear also is drained. The areas where steam circulates is drained out. The rudder tiller itself is secured in a midship position so it can't turn while being towed. The tail shaft and propeller, incidentally, are firmly secured to prevent turning.

Q. What, specifically, is done to the booms?

A. The booms are lowered to the deck or into the cradles provided for storage when they are not in an operating [fol. 186] position, which is horizontal, level with the deck.

Q. What about the gear on the booms?

A. As I stated, we previously removed the gear on the booms and placed the heavy material below deck. The lighter stuff is placed in the storerooms below deck and sealed.

Q. What about the winches?

A. The winches are drained, as the other auxiliary machinery is. The cylinder heads will be slacked off and the packing removed from the piston rods.

Q. In your remarks about the booms you said that the gear was removed. What type of gear does that include?

A. That includes the wire, blocks, shackles, all of the removable gear except the very boom itself, which is too heavy to move.

Q. Mr. Wise, what does reactivation entail?

A. Well, the reverse process. Take out—we would first move the ship to a shipyard, is the general procedure—to a shipyard—put it on drydock and hold a survey at that time jointly with the United States Coast Guard, the American Bureau of Shipping Surveyors. On their findings of the necessary work to be done on the ship, we would prepare a specification for the work and put it out to bids. That would have to include the opening of all machinery for examination, the removal of the preservative oil, cleaning [fol. 187] of the boilers is necessary, reoutfitting the ship,

rerigging the booms, cargo gear would all have to be tested and certified by the American Bureau of Shipping.

Q. Did you say that the cargo gear was tested?

A. Yes, sir.

Q. How?

A. Cargo gear, after it is rigged, is tested to one and a quarter times the safe working stress and the safe working load and then the safe working load must be stamped on the boom. The American Bureau of Shipping must witness this test and issue a certificate accordant.

Q. What is that certificate by the Coast Guard that you just mentioned?

A. The certificate by the Coast Guard is a different matter. That is an inspection certificate. Every operating vessel must be inspected and certified every two years by the Coast Guard. Up until just a few years ago it was an annual inspection required every year and at that inspection—

Q. How long is it now?

A. Every two years. However, the ship is subject to an inspection at any time at the pleasure of the Coast Guard during that two-year interval.

Q. What about the laid up vessels, are they certified?

A. No, they are not operating and they don't require a [fol. 188] certificate until we propose to put them back in operation.

Q. What happens to their certificate?

A. When the vessel comes in for deactivation the certificate is deposited with the Merchant Marine officer at the Coast Guard or it may be picked up by one of his inspectors. If they know the ship is going to be deactivated, they lift it immediately.

Q. Is there any Coast Guard inspection during this period while the vessel is laid up?

A. No, there would be no occasion for it.

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[fol. 190] Q. Now, Mr. Wise, we were talking about the certificate by the Coast Guard. Did you finish your remarks as regards that?

A. I think I told you that when the vessels come in for deactivation the certificate would be either deposited voluntarily or lifted by the Coast Guard and it would no longer be valid. To navigate the vessel again, you would have to get a new certificate issued by the Coast Guard, which could only be obtained by the inspection procedures they require.

Q. I do not recall whether you said it or not. Is there a [fol. 191] certificate while the vessel is—you did state that. Are any inspections made by the Coast Guard while it is laid up?

A. No, sir.

Q. Does the HARRY LANE come under your cognizance or your jurisdiction?

A. Yes, sir. The HARRY LANE is one of the units in our Reserve Fleet at the James River. It is something in the neighborhood of 360 vessels up there.

Q. Can you tell us something of its history?

A. According to our records, the HARRY LANE came into the port in December 1945. It was placed in the Reserve Fleet, deactivated, remained there until 1954, at which time it was loaded with storage grain for the grain storage program with the Department of Agriculture. In 1956 they elected to remove the grain and the vessel was made available for the removal of it, after which it returned to the James River Fleet.

Q. Mr. Wise, are you familiar with the riding gangs employed aboard those ships?

A. Yes, I am familiar with them. We place six men aboard each ship, arrange for it through the agent. He normally would obtain those men from a local stevedoring or shipcleaning concern. Their duties are to handle the lines, to assist in unmooring the vessel at the Fleet and to [fol. 192] be on hand to take lines aboard when they get down here at the dock.

Q. Oh, that is not while the vessel is laid up?

A. No, no.

Q. Oh.

A. They are only hired—for instance, if we are going to pull the ship out this morning, we send a gang of riding crew up there on the tugboat to board the vessel and bring her down. After they get to the dock and make the ship fast,

why, they are through so far as the riding operation is concerned. They don't remain on the vessel. They are not berthed on the vessel or fed on the vessel.

Q. What did you say their duties were?

A. Principally, to handle the lines. You'd find it very difficult to get a line on there with no power or steam, or anything, without somebody being already aboard to take them when you come alongside the dock down there.

Q. Are they messed aboard?

A. No, there are no facilities for mess.

Q. Are they berthed?

A. No.

By the Court:

Q. Did they bring those ships down under a hawser or push them down?

A. They used both methods, your Honor. They use a [fol. 193] tug on the hawser for pulling, but on account of the difficulty getting up under the bridge on the James River because of tidal conditions they put another tug on a hawser to steer because, otherwise, the vessel could not steer itself.

Q. But they pull them down by the hawser until they get in the vicinity of the bridge?

A. Well, they will pull her all the way with a hawser, but they find it expedient for safety with two tugs, one of which is used to steer and push, as well, but the other is used principally for pulling on the hawser, yes.

By Mr. Raywid:

Q. Mr. Wise, are you familiar with the repair and maintenance of blocks?

A. Yes. In the course of the years I have been fooling with them. I had to repair some and inspect many for repairs.

Q. Could you tell us a little bit about that maintenance, repair and testing of blocks?

Colloquy Between Court and Counsel

Mr. Greer: If your Honor please, I assume this is in regard to this block, and I think it will have to be confined to this particular block.

Mr. Kelsey: I might interpose an objection too, Judge, [fol. 194] that if he is referring to ship's block and tackle, I do not know. This ten-inch galvanized block was not used on this vessel, was not owned by the vessel, there are a number of different kinds of blocks—

The Court: I think that the gentleman would have to confine himself to a block that was used in connection, or conjunction, with the marine leg, the part of the unloading operations.

Mr. Raywid: Your Honor, Mr. Wise is an expert in this field and I would like to show, through his evidence, what proper repair and maintenance can be done to a block to insure its proper working order.

The Court: Let's see if he is an expert.

Mr. Greer: I was going to say I admit no qualifications—

Mr. Kelsey: I do not either, Judge.

Mr. Greer: —if these background things are given, as such, to qualify him for that.

The Court: I would say he is an expert in certain types, certain fields, but this is in conjunction with the operation [fol. 195] and maintenance of what is known as a marine leg and, particularly, what is known as these shovels that clean up the balance of the grain in the ship's hold, and I do not know what his experience is along that line because, unless he is familiar with the extent of the use of the blocks, the customary use of the blocks, how often they are inspected, as to those blocks—in order words, I would imagine, not knowing anything about the subject myself, that, to some extent, the duty of an inspection is controlled by the extent of the use of the block. Isn't it? I would think so.

Mr. Raywid: Yes, your Honor, and I would like to ask Mr. Wise just what—how that is a determining factor and how—

The Court: Let's find out what he knows about blocks used in conjunction with the marine leg, then.

Mr. Raywid: Am I to understand by that, your Honor, that you are making a distinction between this block and blocks used aboard ships?

The Court: Yes. Whether they may be of the same general character, they may have different stresses and [fol. 196] strains placed upon them. They may be subjected

to different elements; and I do not know that the subjection to different elements would have a thing to do with it. I am speaking of the weather conditions, and so forth. They may, in turn, be used only occasionally in one instance, whereas, in other instances, they may be used continuously; and that is my offhand feeling. However, maybe Mr. Wise can state that those factors that I have suggested have no significance at all; that it does not make any difference what stress or strain is placed on the block; that it does not make any difference whether it is exposed to the elements or not; that it does not make any difference as to the extent of the use. Now, if that is the situation as to any block, the duty of inspection is the same, the extent of stress and strain is the same, and so forth, and we have no problem, then I think he would be clearly qualified. Otherwise, I think he would have to be peculiarly equipped to testify with respect to the blocks in conjunction with the use of the marine leg.

[fol. 197] By Mr. Raywid:

Q. Then I would like to ask you, Mr. Wise, if you can tell us the general characteristics of all blocks, or what repair and maintenance is necessary of all blocks or of various descriptions?

Mr. Greer: Well now, if your Honor please, I do not want to prolong this in any way, but I still say he has not qualified this witness for that question yet and I insist that some qualification be made.

Mr. Raywid: I would be very happy to qualify Mr. Wise in that respect.

The Court: All right.

By Mr. Raywid:

Q. Mr. Wise, what was the length of your sea duty?

A. From 1917 until 1941.

Q. In the course of that duty, did you ever have occasion, or was it part of your duties, to repair and inspect blocks—test them?

A. Not testing, no, sir. We—not personally test them. I wouldn't ordinarily test equipment.

Q. What about repair and maintenance?

A. Yes, I have had considerable experience assisting the deck officers in repairing their blocks, because the deck officer handled the machinery on the ship and the machine [fol. 198] repair parts for it—lathes, and so forth—and I have had experience in repairing blocks.

Q. In your present capacity, do you ever order repair, from your inspection, of blocks?

A. Oh, yes, in connection with rigging our ships we have to open the blocks up, check them, see that the bushings and pins are not unduly worn. If they are, we order repair to the bushings and pins or renewal of the sheaves where need be, where they are worn. We must do that before we can get the certificate of inspection from the American Bureau that they are safe to operate.

Mr. Raywid: Your Honor, may I now direct a question to him as to regards repair and maintenance of blocks?

Mr. Greer: If I may—

The Court: I think that we better find out whether the factors of stress and strain on a block have anything to do with it.

The Witness: Yes, sir, very definitely.

By the Court:

Q. They do?

A. The general service of the block enters in also.

Q. Whether it is in general service, as such, or whether it is in a specialized service, does that have any difference? [fol. 199] A. Yes, sir.

Q. Would exposure to the elements make any difference?

A. Yes, sir.

Q. Then practically everything I mentioned has something to do with it?

A. Yes, sir, very definitely.

By Mr. Raywid:

Q. Now, may I add to those questions, regardless of the stresses, strains and elements, are there some common methods of repair and maintenance common to all blocks?

Mr. Greer: Now, if your Honor please, I have to object to that question because it is just getting right back to it, your Honor, to what we are faced with, as to what we are particularly involved with.

Mr. Raywid: My point, your Honor, is regardless of what caused the wear of the block, you are still going to inspect it and repair it regardless of what is wrong with it in the same manner.

Mr. Greer: No.

The Court: I think your question is permissible if Mr. Wise is in a position to testify with respect to any and all [fol. 200] blocks, whatever their uses might be and whatever the factors may be, that there may be certain basic requirements. I do not know. But I do not think, at the present time, that he is in a position—unless he can qualify as to the extent of the operation of the marine leg, I do not see how he can get himself in a position to aid you much, Mr. Raywid, as to this particular block. I think there may be, and I do not know whether there are—let's ask him point-blank.

By the Court:

Q. Mr. Wise, in the custom and practice of the trade, are there any practices followed with respect to the inspection of all blocks, no matter what their uses may be?

A. Generally speaking, yes, sir. The frequency of such inspections would vary considerable, but any prudent man would dismantle the blocks based on a sensible program and inspect certain parts particularly which are the first parts to wear, normally.

Q. And the extent of that would be dependent upon the factors that we have discussed before?

A. Yes.

Q. But do you know anything particularly with respect to the operation of a marine leg and the blocks in conjunc- [fol. 201] tion with the operation of a marine leg?

A. I have seen it in operation. In fact, I was here when they first built the marine leg. I watched it rather closely. I was interested in the speed and the rate of discharge and the method of discharge. I have seen it operate, but not sufficiently to say that I am fully familiar with how often the block is used or how much strain goes on it, sir.

By Mr. Raywid:

Q. I would like to ask you, since counsel wants to know if you are an expert on this type of block, have you ever seen a block like this before?

Mr. Kelsey: If your Honor please, I object to any testimony in the future from this witness regarding this particular block, or any blocks, on marine legs, since the witness has completely disqualified himself. He just told the Court that he is not sufficiently familiar with the blocks on the leg to testify.

Mr. Raywid: He did not, sir.

The Court: If you gentlemen will let me have the floor. All Mr. Wise has been asked at the present time is whether he has ever seen a block like that.

[fol. 202] Mr. Kelsey: I say—

The Court: I do not see anything objectionable to that.

By Mr. Raywid:

Q. Mr. Wise, have you ever seen a block like that before?

A. Yes.

Q. Would you, in repairing or inspecting this block, approach it in the same manner as you would other blocks that have been under your—

A. Definitely, yes.

Q. —charge?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Greer: If your Honor please, I again object for the same reasons. I will not restate them.

The Court: I sustain the objection. You cannot qualify the gentleman on a marine leg block, if that is what you want to do, because he has already stated he is not an expert on that subject. Now then, if you are directing your attention to that type of block, it may well be used just like any other type of block. I do not know. I assume it has other uses other than for a marine leg, but Mr. Wise has stated that [fol. 203] he does not know the extent of the stress or strain in connection with a marine leg. That may require an inspection far more regularly than an inspection of other blocks. On the other hand, it may not require but very little inspection.

Mr. Raywid: Your Honor, I am very happy to concede that point, that a marine leg stresses and strains on a block would be quite different than that of a ship, but I do feel that Mr. Wise is an extremely qualified man in the repair and maintenance of a block, and he can look at a block, regardless of what its use is or regardless of what inspection should be necessary under the stresses that it is placed, and tell if the block is defective or not.

Now, Mr. Kelsey, in his cross-examination, had a man come up here and look at this block and tell us what happened to it. This man does not know anything about blocks at all and he told us it was cut. I want to show this block to Mr. Wise and have him, as an experienced man in the handling of blocks regardless of their stresses and strains, tell us if he can see any defects in this thing.

[fol. 204] The Court: It is perfectly apparent there is a defect in it, isn't there? It broke.

Mr. Raywid: Yes, your Honor, and perhaps this is not the only defect.

The Court: That may be so.

Mr. Raywid: And Mr. Wise, I think, is qualified to tell us.

By the Court:

Q. Is that type block the same type block you use for any other purposes on board a vessel?

A. Yes, sir, wherever you want to use a block, you could use that, too. That's a standard block manufactured by Boston-Lockport, I think it is. It is a star-type block.

The Court: I will let you tell, from an examination of the block, if you want to, what, in your opinion, is wrong with the block, but we come back to the next question, Mr. Raywid, that we do not have a gentleman here who is qualified in the field of the operation of a marine leg other than the fact that he has seen it operate. He has watched it operate, but he frankly stated that he did not know the extent of the stresses and strains on that block in con-

[fol. 205] junction with a marine leg.

Mr. Raywid: Your Honor, we have brought into court whom the Government feels is the best expert that we have,

that the Government has, and they are unwilling to admit that he can look at this block and tell us what is wrong with it.

The Court: I told you that I would let him look at the block, but once he gets into the subject that it has so much stress or strain on it, he already admitted that he does not know anything about stress or strain on it.

Mr. Raywid: All right. We will exclude stresses or strains.

The Court: Weather elements and other factors that he stated would play a part in it. Now, if he wants to take that block and assume that that block was used on deck in conjunction with an operation of some winch, or something like that, that would be all right, if he wants to just use that for illustration purposes.

Mr. Raywid: All right.

[fol. 206] By Mr. Raywid:

Q. Mr. Wise, in looking at this block, will you tell us what the usual repair and maintenance is and what repair and maintenance you might thing this block needs?

A. Well, first, before you would repair any block, you would first find out what was wrong with it, and to do that, you would inspect it. An adequate inspection, you will knock that pin out, knock the cotter pin out, and knock the bushings out and the vital parts can be examined.

Q. What is the bushing?

A. The bushing is the bearing, the same as the bearing in your car, that is fitted inside this wheel to operate on this shaft. This pin is a shaft. The bushing is a low friction metal. It could be either bronze or it might be babbitt and, in some instances, very rarely within a block —it wouldn't be used in a block—some are roller bearings.

Q. What could go wrong with the bushings?

A. Just wore out. If it wasn't wore out, the sheave couldn't cock that way and wear out the strap as it has. The bushing is gone. Otherwise, if the bushing had reduced clearance that is built there, it would hold the sheave in a straight line parallel to the block and there would be no wear on the side.

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[fol. 210] The Court: I think I can clear this up, Mr. Kelsey, by asking the witness to feel the edges and ask him whether or not a continuous rubbing of that edge against those edges, either one or both, against the strap, in their present condition, would be capable of cutting the [fol. 211] strap?

The Witness: Yes, definitely. They didn't cut it. They wore it in two.

* * * * * * *

Cross examination.

By Mr. Greer:

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[fol. 213] Q. Would this particular block, which we have here as an exhibit, be used on the ship's winches where you have your cables, which you use for cargo loading or unloading, and so on, or assisting in the—

A. I don't think it would. Our cargo gear is generally prepared for five-ton loads and up, and that block wouldn't be large enough. We would want—I don't think we use any-[fol. 214] thing, in our purchase list, anything under fourteen inches, and that's about an eight or ten-inch block.

Q. Would this be used—not a question of the load—but as far as using rope and also using your steel cable, would you use steel cable on this, too?

A. On that?

Q. Yes.

A. Not unless you changed your sheave and you probably would get a special steel block for that. That sheave is used to take manila rope.

* * * * * * *

[fol. 215] Redirect examination.

By Mr. Raywid:

Q. Mr. Wise, prior to the break of this block, do you think that there would be anything detectable—

Mr. Greer: Now, just a minute. I object to that, if your Honor please. Excuse me, I thought you finished your question. Go ahead.

By Mr. Raywid:

Q. Let's see. Prior to the breaking of this strap, do you think that any imperfections would be detectable on inspection of this block?

Mr. Greer: I object to that, your Honor.

Mr. Kelsey: I object, before he answers that. You go ahead, Mr. Greer, and I will make my—

Mr. Greer: The witness has already stated that he is not familiar with the way this block is used or how it is rigged, or anything like that, and I do not think he is [fol. 216] qualified to answer that. That is indulging in pure speculation, saying whether anything is detectable, and I object to the question.

Mr. Kelsey: If your Honor please, I object.

The Court: Wait a minute. I am going to sustain that objection. Do you want to get one in too?

Mr. Kelsey: Well, you sustained it, so there is no need for me to make an objection.

Mr. Raywid: Your Honor, we have established that Mr. Wise is an expert in looking at blocks and telling what repair and maintenance is necessary. I am asking him if he could tell, by looking at that, or anybody else could tell, if there was anything defective in this block.

The Court: I still sustain the objection.

Mr. Raywid: No further questions.

Mr. Kelsey: I have no questions, Judge.

The Court: Thank you, Mr. Wise. May Mr. Wise be excused, gentlemen?

Mr. Eley: Yes, sir, as far as we are concerned.

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[fol. 224] EDWIN J. ADAMS, called as a witness by and on behalf of the third party respondent and petitioner Continental Grain Company, having been duly sworn, testified as follows:

Direct examination.

By Mr. Greer:

Q. You are Mr. E. J. Adams, are you not, sir?

A. Yes, sir.

Q. Mr. Adams, state your occupation and the position with your company.

A. I am a stevedore superintendent.

[fol. 225] Q. With whom?

A. With Atlantic and Gulf Grain Stevedoring Associates and Atlantic and Gulf Stevedores, Incorporated.

Q. Mr. Adams, are you familiar with the contract between the Continental Grain Company and Atlantic and Gulf Stevedoring Associates?

A. I know what the rates were. As far as I know, there is no written contract.

Q. Oral contract, in other words?

A. Oral, yes, sir.

Q. Would you state whether or not the Atlantic and Gulf Grain Stevedoring Associates which, from now on out, I will just call Atlantic and Gulf, did all of the work for Continental Grain out at the grain piers as far as the stevedoring work was concerned?

A. Yes, sir, they did.

Q. Mr. Adams, have you had occasion, in your capacity with your company, to be out at the grain piers in regard to any loading or unloading of grain?

A. Yes, sir.

Q. Have you observed and been around this marine leg, which is the device that was used in this particular ship?

A. Yes, sir.

Q. Let me ask this—perhaps it is a leading question—[fol. 226] to save time. Now, as has already been described here, there is certain tackle on this, being some pulleys which are hooked to padeyes down at the bottom which are

used with shovels, shoveling the grain into the bottom of the leg.

A. That's right.

Q. And you are familiar with that—

A. Yes, sir.

Q. —operation, are you not? Mr. Adams, would you state whether or not you have, yourself, had an occasion and have you made any inspection of the blocks and the ropes, and so on, that the stevedores use, the longshoremen use?

A. Yes, sir, on various occasions I inspected them.

Q. And what would be your purpose in doing so?

A. Check it to determine whether or not they are in a safe condition, condition that they can be properly worked.

Q. And as far as these blocks and this tackle, which I have just described, that is, being your shovels, and such as that, they were used, were they not, since you were the only ones doing the work, exclusively by your stevedoring company, by your gangs of longshoremen and stevedores?

A. No, sir.

Q. They were not?

A. No, sir.

Q. Who else were they used by?

[fol. 227] A. Continental Grain used them on the discharge of barges.

Q. On the discharge of barges?

A. Yes, sir.

Q. Well then, confining ourselves to ships, would you use them exclusively on the ships?

A. On ships, yes, sir.

Q. In other words, that is what your contractual arrangement was?

A. Yes, sir.

Q. To discharge all the ships?

A. Yes, sir.

* * * * * * *

[fol. 231] Cross examination.

By Mr. Eley:

Q. Mr. Adams, who owned the equipment, including the block, that you all used while unloading vessels down at the grain elevator?

A. The block belongs to Continental Grain.

Q. As I understand it, that block and other equipment you used is used by Continental Grain itself in unloading other equipment—

A. Yes, sir.

Q. I mean other barges?

A. Yes, sir.

Q. It is not solely for your exclusive use, then?

A. No, sir.

Q. Would you be the supervisor directly over Mr. Roper?

A. I was at the time that this accident happened, yes, sir.

Q. And for how long after the accident?

[fol. 232] A. Well, the superintendent, at the time, of the elevator, I believe, was on vacation, so I was down at the elevator all the time. In other words, the superintendent that's there, I'm over him, but I don't spend all my time there. I was there for two weeks and the other fellow spent his time there.

Q. And do you spend a good deal of your time—

A. I would say I average four to five hours a day on commercial ships at the elevator. It all depends on the day and night.

Q. And on that occasion you would be in close association with Mr. Roper?

A. Yes, sir.

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[fol. 233] Cross examination.

By Mr. Raywid:

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Q. And you make an inspection of the blocks?

A. Yes, sir.

Q. How often do you check them?

A. Oh, I would say, myself, maybe once a month, maybe once every two months, I take a look at them. The foreman that works the ship is supposed to check them once a day.

Q. He is supposed to look at them every day?

A. Yes, sir.

Q. Is there any order to that effect?

A. I can't say offhand. We have sent out safety—

Q. But he understands—

A. —safety instructions. Now, whether or not that ex-
[fol. 234] plicitly states that, I don't remember. I know, at safety meetings we have had, it's been mentioned.

Q. And you say you, yourself, checked them about once a month or maybe once every other month?

A. Maybe every other month, something like that. Sometimes it might go three months. I couldn't say definitely the last time or, rather, the time of this, I checked it. I know it had been on the ship.

Q. But there is no definite time—

A. No, there is no definite pattern, I would say, that I go every month or every second week, no, sir.

Q. And you do not have any orders to the effect that you are supposed to inspect once a month—

A. No, sir.

Q. —or just that you are supposed to make periodic inspections, routine inspections?

A. I make periodic inspections and the foreman checks every day.

Q. Would your inspection vary at all because of the use of the block?

A. Well, yes, if it's in use, you would be at the operation more often and there would be the tendency to check more often. In other words, there are times when that leg lays there for eight months without being used.

Q. How do you make your checks?

[fol. 235] A. Just a visual check. You look at the block and see if there is any place—you will see sometimes where it wears. In other words, if it's on the pad or a shackle is on it, you could see a visible sign of wear.

Q. What do you mean by that? For instance, this is wear, is it not?

A. Yes, that's wear from a shackle.

Mr. Greer: For the record, I think you should point out that the witness pointed out the loop of the strap. That is not any part which was actually broken when he stated that.

Mr. Raywid: Thank you for that.

The Witness: No, sir.

By Mr. Raywid:

Q. Do you see any other signs of wear?

A. Well, I know where the wear is now.

Q. I would not call that wear any more. That is a break?

A. Yes; well, that's right.

Q. But that is my—

A. That's where the block parted. No doubt about that.

Q. Any other signs of wear?

A. As far as affecting the—now, the cheeks of the block [fol. 236] are spread.

Q. Anything else? Do you want to take it in your own hands?

A. You mean disregarding the fact that she's cut?

Q. That is right.

A. Well, the cheeks are spread on this block now.

Q. Okay.

A. They weren't when the block is in normal working order.

Q. Which would not be noticed, of course?

A. And you've got wear here in the shackle that is not enough to affect the operation. You are going to get wear on the movement, of course.

Q. Do you see anything else?

A. I don't see anything else.

Q. In other words, you made a complete check, assuming this was in order?

A. That's all I check, yes—took a look—

Q. As to the strap, do you think you could see this cut or break?

A. At the time we said, no, we couldn't see it. I mean I have never seen a block part this way before and nobody that was working with us had ever seen it.

Q. Does anybody else in your concern check these blocks or are you the final checkman?

[fol. 237] A. No, the—I know the bosses check them on occasions. I wouldn't say how often, but I know he checks them. I know the superintendent of the elevator himself checks for our company. I mean our superintendent.

Q. They make the same kind of check that you make?

A. They take a look at it, yes. We don't take it apart. We look at the four blocks, I'd say, maybe in a minute and a half or two minutes, something like that.

Q. That seems adequate. How long has this block been in use, do you know?

A. I have no idea.

Q. Do you have any records of this block?

A. No, sir.

Q. You do not know when it was—

A. I have no records, no, sir.

Q. Do you make any records of your inspections?

A. No, sir.

Q. You know, in the Navy, we have a—

A. Check list.

Q. You are familiar with a checkoff list?

A. Checkoff list.

Q. To make sure that somebody did the job?

A. Yes, sir.

Q. But you do not have that?

A. No, sir.

[fol. 238] Q. Now then, where was this block used?

A. It was on the—looking at the leg from the offshore side or the leg as it is lowered into the ship, it was on the offshore corner of the leg, offshore right-hand corner of the leg.

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[fol. 245] A. L. DONATI, called as a witness by and on behalf of the third party respondent and petitioner Continental Grain Company, having been duly sworn, testified as follows:

Direct examination.

By Mr. Greer:

* * * * * * *

[fol. 246] Q. Mr. Donati, let me ask you this: Are you at all familiar with the Uniform Grain Storage Agreement that Continental has with the Government?

A. Yes, I am.

Q. In regard to the wheat or grain, rather, that is handled for the Government, who does the loading and unloading of such wheat?

A. You mean the stevedoring?

Q. Yes.

A. The Atlantic and Gulf. We have the contract at the elevator. We sublet it to the Atlantic and Gulf Associates.

Q. And they, insofar as ships are concerned, anyway, do all of your loading?

A. They do all of the loading and unloading.

Q. Just confining ourselves to these Government ships, the stevedores, of course, make a certain charge, do they not, for their work?

A. Yes, that's right.

Q. What was that based on?

A. Per ton, on a per ton basis.

Q. In other words, Continental will pay them so much per ton for the unloading?

A. We collect the tonnage from the—we have a negotiated contract other than the Uniform Storage Agreement from [fol. 247] the C. C., Commodity Credit, other than the Uniform Storage Agreement for the discharge of vessels. I think that rate is—at that time was thirty-nine cents per ton, if my memory is correct.

Q. That is right. According to this Government Exhibit, that would be correct. And so that, of course, is over and above your—

A. Uniform—

Q. —warehousing charge, so to speak?

A. Yes, sir, that's separate from the Uniform Storage Agreement.

Q. And that charge, then, is made to the Government, is it not?

A. That's right. Yes, it is negotiated separately.

Q. They, of course, then pay that charge and that charge is paid to the Atlantic and Gulf?

A. We make the collection, and, in turn, check over to them, yes, sir.

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[fol. 248] Cross examination.

By Mr. Eley:

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Q. Do you know anything, within your knowledge, of the maintenance of the equipment, who is to furnish the stevedoring equipment for the loading and unloading of grain?

A. Well now, you specify the stevedoring equipment. What equipment do you mean?

Q. In particular, the marine leg or any of the appurtenances thereto, such as the plows, the lines, the blocks, any falls?

A. Well, that equipment comes, I think, under the category of the elevator.

Q. Of the elevator—

A. Yes, sir.

Q. —which is leased by Continental Grain?

A. Yes, sir.

[fol. 249] Q. So that then would be furnished by you to the Atlantic and Gulf; is that correct?

A. Yes.

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[fol. 250] Albert Holt, called as a witness by and on behalf of the third party respondent and petitioner Continental Grain Company, having been duly sworn, testified as follows:

Direct examination.

By Mr. Greer:

Q. You are Mr. Albert Holt?

A. Yes, sir.

[fol. 251] Q. Speak up loud enough for these gentlemen to hear you, Mr. Holt. What is your position with Continental Grain Company?

A. Superintendent of the grain elevator.

Q. As such, I take it that means what the word "superintendent" ordinarily means, you are in charge?

A. In charge of the operation.

Q. In charge of the operations out there; is that right?

A. That is right.

Q. All right. Now, Mr. Holt, in regard to the loading and unloading of grain from ships, who does that work?

A. The stevedores, Atlantic and Gulf Stevedores, do the work in the holds and they take charge of the leg on deck of the ship.

Q. Speaking of the "leg," that is the marine leg which is the bucket mechanism for unloading; is that correct?

A. Yes, sir; that's right.

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[fol. 257] Q. Mr. Holt, in regard to that, you have previously stated that the stevedores would be the ones doing all of the work in the hold; is that correct?

A. They do all the work in the hold, yes.

Q. Would any of Continental's people be employed in the actual unloading operation?

A. Well, with the operations of moving the leg down in the hold, that would be done by a Continental man.

Q. Where is he situated? Does it show on this same exhibit?

A. Yes.

Q. 3-I?

A. Yes. He is situated right in this little cab here on this side of the leg, which you can see.

Q. It shows a little house up in all of this scaffolding?

A. Yes.

Q. All right, go ahead from there.

A. Where do you mean? You want—

Q. I mean, he is the Continental man. You say he [fol. 258] lowers that in—

A. He lowers the leg into the hold.

Q. Who directs the lowering of the leg?

A. The stevedore, one of them, directs the lowering of the leg into the hold.

Q. Taking it further, after it is gotten to the bottom and they use this, who uses these lines in pulling the clutch lines, and so on, and using the shovels?

A. The stevedores pull the line—pull the clutch—engage the clutches and disengage the clutches. Our man, he starts the shovels' brakes in operation.

Q. As far as rigging on these padeyes, as you have described, when it goes a certain distance, they will be at the top padeye, and all the way to the bottom, they will put it on the second, and so on, who does that?

A. The stevedore does that.

Q. Mr. Holt, in regard to the equipment, such as the blocks which are used on the padeyes that you have described, who owns those blocks?

A. The blocks? We own the blocks.

Q. In regard to any repairs, or anything like that, would you state whether or not the stevedores tell you of any defects, and what is done then, and so on?

A. Oh, yes, if they see anything wrong with those blocks—we have had as high as three blocks in millwright [fol. 259] shop being repaired. By repairs, we probably put some wheels—new wheels and pins in these blocks.

Q. And that will be done when the stevedores request that?

A. Well, if they recommend a block to be fixed, we fix it.

Q. In regard to the use of this marine leg, is it used on anything other than ships, such as barges, and such as that, to unload?

A. It's only used on barges. We have used it on little bay boats or, well, large size bay boats, I should say, and to expedite the movement. Our evacuator is a little slow and we do a little dipping in barges and bay boats.

Q. In the unloading of those, who does that unloading?

A. Our own men, Continental Grain men, do the unloading of those.

Q. Is there any inspection made of this gear, the marine leg as a whole and the gear on the marine leg?

A. Well, we go—if the leg has been out of operation for sometime, we check it over, and a lot of times we will have rainstorms and the buckets will fill up with water and we start the leg and dump the water out, and they make a general checkup of the leg before it is used.

[fol. 260] Q. And those are the men, the Continental men, whom you supervise; is that correct?

A. That's right, yes.

Q. Does that also include the ones—when Continental uses their own men on these barges, they would check this tackle, and so on—

A. That's right.

Q. —would they not?

A. Yes.

By the Court:

Q. Who would check the blocks other than the stevedores?

A. Well, generally, the stevedores will let us know if a block is—you know, they are working with them all the time and generally they will let us know if a block has to be repaired or if it is in poor condition.

Q. Yes, I understand that. But assuming that they do not ever report any blocks in poor condition, who checks the blocks for Continental Grain?

A. Well, we have—we have went over them. I mean, we check them, but—to see if the wheels are—any play in the wheels.

Q. Well now, that is what I want to know. How often and when do you do that?

A. Well, usually we do that before we—if it's been out [fol. 261] of operation for sometime, we do it before we start. By starting, I mean we might—might start on a ship and work a couple of days just dipping or digging, rather, where we don't need the shovels.

By Mr. Greer:

Q. And I had asked you also, just before his Honor asked a question, when you use your own men instead of these stevedores on these barges and all, do they have occasion to use these blocks at all?

A. Oh, yes. Yes, we have had occasion to use them. As I say, to expedite the movement where we want to get the ship or the bay boat unloaded as fast as possible, we put probably two shovels in there and two men.

Q. Will you state whether or not they check those, and if anything is wrong, it is taken to the millwright shop or not, or just what is done in that regard?

A. Well, we have had that happen often where they have taken blocks in there and had them repaired.

Q. Mr. Holt, this particular block here, which is Exhibit No. 5, do you know what type of block that is?

A. That is a Boston-Lockport.

By the Court:

Q. A what?

A. Boston-Lockport, I think is the name of it.

[fol. 262] By Mr. Greer:

Q. You mean that is the name of the—

A. The block.

Q. —manufacturer?

A. That manufactures it.

The Court: Boston-Lockwood?

Mr. Greer: Lockport, I think he said.

The Witness: Boston-Lockport.

By Mr. Greer:

Q. Has this type of block been used out there for over a period of time? Well, when was this leg put in, do you know?

A. I don't know exactly. It was here when I come here, and that was—let's see. It probably was put up there in '54 or '55. I don't know. That was before I got here.

Q. And had you had occasion to order any of these blocks to be used out there on that leg?

A. Yes, yes.

Q. From whom would you order these blocks, and would you state what type of block you would order?

Mr. Greer: I would like to call your attention to a book here, your Honor, which I do not know if it would be necessary for me to introduce into evidence. It is just [fol. 263] a matter of the type of block and the order number, just showing through a house here and a regular manufacturer.

The Court: I think Mr. Holt could refresh his memory by the use of the so-called catalog.

Mr. Greer: All right. Do you want to see this first?

Mr. Raywid: I just want to see what he is using.

The Witness: I haven't got my glasses on.

By Mr. Greer:

Q. Speak up.

A. I haven't got my glasses with me. This is the type. It's a single sheave, ten-inch block, they call it, and it is for an inch—I think this block is built for an inch and a quarter rope, but we have been using an inch rope for the shovels, and that's the B. and L. brand. That's all—just about all the explanation I can do. It's a ten-inch block.

Q. Since you are without your glasses, if I may be permitted—

The Court: You may be permitted to read it, Mr. Greer. [fol. 264] Mr. Greer: B. and L. star brand metal tackle blocks for manila ropes, shackles with iron sleeves, shell with certified malleable iron carefully rounded with sharp projections.

The Witness: That is the type.

By Mr. Greer:

Q. That is the single one?

A. Single.

Q. The other one, I believe, is double, and this is confining it to the single?

A. That's right, yes.

Q. And these are the ones you have ordered on occasions?

A. That's right.

Q. Mr. Holt, I believe this shows you ordered them through what company?

A. Taylor-Parker.

Q. And any others?

A. We have ordered two of them from Taylor-Parker and two of them from C. E. Thurston Company.

Q. Those blocks, which you have ordered and have been using, are they blocks, from your experience, which are regularly used for such work as this?

A. Well, that's the best block we could—that they had [fol. 265] available. That's the best one that we could find.

Q. Mr. Holt, have you ever, in your experience, observed one of these type blocks cut through this metal shaft in the fashion that this has been cut through?

A. I never seen it happen before.

Q. And any of these blocks, which you stated the stevedores would tell you about, or your own men when they are unloading, when some work had to be done, was there any such difficulty as this encountered?

A. We haven't encountered that. They have damaged the blocks by putting the leg in the ship. I mean they might have scraped the side with the blocks and bent them or we had to take them in and repair them.

Q. And those would be, as you have stated before, sent to you be the stevedores, when they checked them, or by your own men, when you unloaded the barges?

A. Yes. You mean in pertaining to the repairing?

Q. Yes.

A. Yes, we have ordered half a dozen wheels and pins, new pins for them.

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[fol. 266] Cross examination.

By Mr. Eley:

Q. During the actual unloading operation, Mr. Holt, there is always someone from Continental Grain in the working portion of the leg, so to speak, is there not?

A. Yes, on that picture, which I pointed out.

Q. That is this picture here, sir?

A. Yes. We have a man up here in the control room. This is the control room, and he lets that leg up or down, whichever the case—whichever they call for, and he also starts the shovel machinery and he operates right in here. There are windows on all three sides of it.

[fol. 267] Q. Right. And the machinery that is turned on and operated by the belt mechanism, that is part of the equipment that is leased from the Norfolk and Western, as I understand it?

A. That's right.

Q. And except for major repairs, I believe it is Continental's responsibility to make minor repairs?

A. That is right.

Q. Do you have a regular maintenance crew at the elevator?

A. We do, yes, sir.

Q. And do they have a machine shop to assist?

A. Yes, sir, they have—we have a machine—well, it's a shop. If we have anything we have to machine, we either send it out or the railroad does it.

Q. With regard to the blocks and the lines, I believe they are owned and purchased by Continental Grain; is that correct?

A. Yes, sir.

Q. Are they ever regularly inspected at regular, set intervals?

A. Well, it's just like I say. If they are out of order for long—I mean if they are not used right along, we inspect them before we start in. We see that the wheels are turning, and all that.

[fol. 268] Q. So, actually, there are no regular intervals; it depends on how you are working at the elevator; is that correct?

A. Well, unloading these ships is not a steady process. We—I think we have unloaded twenty-eight of them since July, July 1956, so it isn't a regular assignment. It's just when they buy this stuff, we take them in. I mean that there is no set crew there.

Q. And there is no set time when you would inspect these blocks, then; is that correct?

A. That's right, yes, sir.

By the Court:

Q. How long would the leg have to be out of operation before you would deem it proper to make a complete inspection of all of the equipment again?

A. Well—

Q. Two days, two weeks, two months, or whatever—

A. Well, I would say if it was idle for two months, we would inspect it, yes.

Q. You had twenty-eight ships in there since when?

A. Since July 1956.

Q. Of course, we do not know when those ships came in, naturally, but it is unlikely that the leg would be out of operation for a period as long as two months; isn't that true?

[fol. 269] A. Yes; sometimes longer than that, I think, your Honor—probably sometimes it might elapse six months. I haven't the exact figure.

Q. It depends upon the weather conditions and the season of the year for shipment of articles?

A. And our orders, what we got ordered across the sea, it all depends.

By Mr. Eley:

Q. When you mentioned twenty-eight ships, are you speaking of Government deactivated ships?

A. That is right, yes, sir.

Q. In between those ships you have used the marine leg on other types of ships, barges?

A. Well, yes, we have unloaded some barges.

Q. During that time the entire loading operation was done purely and simply by Continental Grain?

A. Yes.

Q. No Atlantic and Gulf employees whatsoever on those unloading operations?

A. No, sir.

Q. Do you know whether or not, when your repair and inspection crew inspect these blocks, they take them apart?

A. No, they do not. They try the wheels and see if they are running freely.

[fol. 270] Q. It is a visual inspection; is that correct?

A. That's right.

Mr. Eley: All right, sir. Fine. Thank you.

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[fol. 315] JAMES F. WISE, called as a witness by and on behalf of the United States of America, having been duly sworn, testified as follows:

Direct examination.

By Mr. Raywid:

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[fol. 316] Q. Now, would you explain to us—and, generally, this applies to all dead vessels—what the function of the general agency is in connection with the dead ships?

A. That would vary.

Q. How is the general agent used in that connection?

A. That would vary considerably, according to what the ship was going to be used for, what activity it would go into. If the ship is going into service as an operating vessel, the general agent has very extensive duties to perform, including the crewing of the vessel, supplies and outfitting equipment, procuring fuel, water, everything necessary to the operation of the ship; also to receive all monies for freights or income, make all disbursements for expenses. These are handled through a special bank account maintained by the agent, funds supplied by the Government initially. It also would effect any necessary repairs and maintain the vessel while in operation.

Q. Would these same duties be required if the vessel was not intended for active navigation?

A. No, only to a minor extent.

Q. What functions does the general agent perform for [fol. 317] a ship, for a dead ship, where there is no intention to put it in navigation?

A. Well, there again, it depends somewhat on the service of the ship. The ships in the grain storage program is very limited duties performed by the agent. He doesn't have to hire a complete crew. He has no revenues accruing to the vessel that he collects. He has practically no supplies to obtain for it and the time the vessel is out of the fleet and in his custody is very limited, as a rule.

Q. In connection with the HARRY LANE, what services were provided by the general agent?

A. Well, the general agent received custody of the vessel at the Reserve Fleet, at which time he would put on a crew of line handlers, consisting of six men, to handle lines on the vessel; to unmoor it at the Fleet and to moor it when it arrived at the berth at the elevator, also a riding master in charge. He would arrange for stevedores, contract labor, to attend the vessel after it arrived; to maintain constant attendance on the lines as it was necessary, to tighten them up or slack them off as the vessel changed position due to change in the tides or its loaded condition. He also would contract for, and arrange for, a cleaning gang to clean the holds and prepare them for grain if it was loading, or if a vessel is discharging, to clean the holds after the grain was removed and do other [fol. 318] duties in connection with the loading operation. The vessel, to load, would have to be fumigated, ventilating system installed and thoroughly cleaned and made grain tight in the holds.

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[fol. 320] By Mr. Raywid:

Q. Mr. Wise, can you give us the dates that the HARRY LANE, for this movement to the Continental Grain pier, was placed under the General Agency Assignment?

A. May I refer to notes I have on it?

Q. Yes, you may.

A. The HARRY LANE, in this instance—this was 1956,

I think—was withdrawn from the Fleet September 14, 1956. American Foreign Steamship Company were assigned as general agents. It was withdrawn for the purpose of discharging grain at the Norfolk and Western grain elevator.

Q. Do you have any records which indicate when the HARRY LANE was under a general agency assignment?

A. Prior to that?

Q. Prior to the one you just quoted.

A. Prior to that, June 7, 1954, the vessel was assigned to T. J. Stevenson for grain storage, withdrawn from the Fleet to load a cargo of grain at the Norfolk and Western grain elevator in Norfolk. That loading was done between June 18th and June 21, 1954.

Q. So the only removal of the ship or placement of the ship under a general agency agreement or assignment was in '54; is that correct? There is no intervening movement or assignment?

A. From June 1954 to September 1956 the vessel re- [fol. 321] mained in the Fleet loaded with wheat and was not moved.

Q. And the June '54 movement was for loading of grain; is that what you said?

A. That's right.

Q. And at what place?

A. At the Norfolk and Western grain elevator; loaded, according to our records, 227,000 bushels.

Q. What is the next assignment and movement you have?

A. September 1956 the vessel was withdrawn to discharge that cargo.

Q. At what place?

A. Norfolk and Western grain elevator.

Q. Mr. Wise, are you familiar with grain handling facilities within the Norfolk area?

A. Well, I have observed the grain handling facilities. I visited them quite frequently.

Q. Can you tell us briefly, or, in 1956, what grain handling facilities were in the Norfolk area?

A. At that time the only elevator in the Norfolk area was the Norfolk and Western elevator, the only one in operation.

Q. By the Norfolk and Western elevator, that is the same elevator that is operated by Continental, is it not?

[fol. 322] A. Yes, located at Sewells Point and it is presently operated by Continental Grain Company.

Q. Now, under a general agency assignment, are any repairs or installations, improvements or changes, made to vessels, that is, dead grain vessels of the Reserve Fleet?

A. Normally, there would be no repairs. In preparing a ship to load grain, we have to install a special ventilating system in order that the grain may be kept in fair condition while it is in the Fleet. Sometimes there might be minor repairs. After Hurricane Hazel we had one or two ships where the shell was pierced or otherwise leaking and we had to make those compartments watertight before reloading.

Q. You say this special ventilating system is installed under the general agency agreement, assignment?

A. Yes, it is installed by the cleaning contractor, together with other workers preparing the ship to load grain. It consists of a series of perforated tubes that are placed along the bottom of the hold with a pipe leading up to the deck where a fan can be attached to force air through the grain.

Q. Is that similar to aerating gear they have on active grain vessels, do you know?

A. You mean vessels in regular commercial service?

Q. Yes, sir.

[fol. 323] A. Never have seen one on those.

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[fol. 330] By Mr. Raywid:

Q. Mr. Wise, would you explain the policy reasons behind the use of general agents?

Mr. Kelsey: If your Honor please, I do not know whether this witness is competent to explain the policy of the Government.

The Court: You may cross-examine him. He has stated that he is the area representative for the Maritime Administration, the Department of Commerce. I imagine there are

others probably better qualified, but if he knows the policy, I think he can testify to it.

A. I think it's quite obvious what the policy is based on, at least. The policy has been established over a long period of time, certainly prior to World War II, to utilize general agents in handling our vessels because we have there [fol. 331] a staff of competent steamship operators readily available, and since our demand for vessels fluctuates so much, it would be far more expensive to maintain a permanent staff of Government employees only to handle these vessels. It would be practically prohibitive, and we have the talent and the ability and the steamship operators who own and operate their own ships. That is one of the qualifications demanded before a general agency agreement is executed. The man must have a shore staff to supervise the activities of the vessel and they must own vessels of their own in operation.

Q. Might these services differ with different vessels?

A. They definitely would, the services that we would require of the general agent.

Q. Do you ever make use of a general agent to deactivate a ship?

A. Yes, in nearly every instance that we have a vessel deactivated to go in the laid up fleet, Maritime owned control vessel, the work is supervised and handled by the general agent.

* * * * * * *

[fol. 332] Cross examination.

By Mr. Lindauer:

Q. Mr. Wise, the reason you say the Government employs these general agents is because they are trained and qualified in the type of services that the Government requires under those circumstances; is that not correct?

A. That is correct. They have a permanent staff, shore staff, port engineers, operating people, commissary stores, and such.

Q. In other words, the nature of the services the Government requires, then, are virtually identical or similar to

the type of services that ordinary shipping companies would require; is that not correct?

A. With most vessels, yes, sir.

Q. That is correct. In other words, then, the type of services performed by this general agent would be virtually identical to the services performed by them for their own ships which are handling cargo; is that not correct?

A. Essentially so on any operating vessel. That wouldn't hold true with the grain ships, because you don't go to the same extent in the services you need from them. As a matter of fact, the general agent's compensation, after a minimum number of days, a stipulated number of days—ten—is reduced because it is assumed he will have very [fol. 333] little work to do on the grain ship and utilize very little of his staff in that work.

• • • • • • •

[fol. 337] By Mr. Lindauer:

Q. Are you familiar with the crew that was employed aboard the HARRY LANE to bring it from the Reserve Fleet to the grain elevator? Are you familiar with the requirements aboard that vessel?

A. Yes.

Q. What men were required to be employed that vessel?

A. Six men.

Q. And did they not have to have Coast Guard documents?

A. They are not required by the Coast Guard to have the Coast Guard documents, since the Coast Guard does not require a permit for tow. As a prudent manner, the Mari- [fol. 338] time elects to have men with Coast Guard documents.

Q. Is it not a requirement of the Maritime Administration for these men to have Coast Guard documents?

A. I just stated that it is.

Q. It is. In referring to Government's Exhibit No. 5, item No. 1 states that these men are required to have "valid Coast Guard documents." These would be Coast Guard documents as seamen; is that not correct?

A. As seamen in a broad term of the word. We would not demand AB's. We may have firemen, messmen, whatever they are.

Q. But it is still a seaman?

A. Yes.

Q. One who is trained for the operation of a vessel; is that not correct?

A. I would think so, if the Coast Guard issued them a document.

• • • • • • •

[fol. 339] Q. In other words, under this, you can require the general agent to perform any service that would customarily be performed for a vessel going from one port to another?

A. I think that's correct.

• • • • • • •

[fol. 342] By Mr. Lindauer:

Q. Mr. Wise, the master of the HARRY LANE, who employs him?

A. The general agent.

Q. He is not an employee of the Maritime Commission?

A. Only in—as much as the general agent in his capacity acts for the Maritime Commission. He is actually employed by the agent and assigned by the agent as an agent for the Maritime Commission—Administration.

Q. Now, he, as master of the HARRY LANE, was solely in charge of these men who were, as you call them, the riding crew—they were solely answerable to the master, then, and his orders; is that not correct?

A. Yes.

Q. And they were required to handle all mooring lines—

A. That's right.

Q. —and to do anything else he told them in regard to moving the HARRY LANE and docking it and—

A. According to the specifications in the contract, yes.

Q. That is correct. He could also require them to do anything in regard to any work about the vessel HARRY LANE that needed being done; is that not correct?

A. Anything within their capabilities.

[fol. 343] Q. Anything within their capabilities as seamen?

A. As seamen.

Q. As seamen?

A. Yes.

Q. You said they had documents as seamen. In other words, they could be required by the master to do any services that a seaman would normally perform?

A. I should think so, if it was within their ability to do it.

Q. Well, they are documented seamen; is that not correct?

A. They are supposed to be.

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[fol. 346] Redirect examination.

By Mr. Raywid:

Q. Mr. Wise, under the general agency agreement, you stated to Mr. Lindauer that the services that the Govern-[fol. 347] ment could get from the general agent could be very wide; is that correct?

A. That is correct, yes, very broad.

Q. They could be as wide as operating a fully navigable ship in active navigation; is that correct?

A. Definitely.

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[fol. 357] Raymond W. Fretz, called as a witness by and on behalf of the United States of America, having been duly sworn, testified as follows:

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[fol. 370] Cross examination.

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[fol. 374] By Mr. Kelsey:

Q. These documents, or these Inventory Acquisitions, I should say, state on their face, "Ex Reserve Fleet Vessel, [fol. 375] SS HARRY LANE." These acquisitions were,

therefore, acquired from the HARRY LANE, were they not, Mr. Fretz?

A. Yes, sir.

• • • • • • •

[fol. 399] Q. So the purpose of bringing it to your elevator, whether it is for conditioning or immediate sale, is for the eventual sale? It is not taken and sent back to the James River Fleet, is it?

A. Well, basically, every bushel of grain that's ever handled is eventually going to be sold. People can't—people couldn't store grain because they love it. They store it because it's a functionable commodity which they want to use for feed—for some purpose—at a later date.

Q. That is what we are getting at. So even if you were used as a warehouseman, which you say you are used, you are used as a warehouseman for the eventual purposes of sale; is that not true?

A. Well, there have been numerous instances in our operation at Norfolk where we have acted strictly as a warehouseman. A good example is this Public Law 480—I do not know whether you are familiar with it or not—but under Title 2 of Public Law 480 the Government gives away these grains. There is no sale of them. It is a distinct giveaway to a foreign country, and we have handled numerous quantities. I couldn't make an estimate at the moment of how much, but we have handled a lot of those.

Q. Let's get to the HARRY LANE. There is a con-[fol. 400] firmation of sale in the HARRY LANE. This was not given to Finland, was it?

A. I don't know what program that was under. It could easily have been given to Finland.

Q. It says a confirmation of sale. You bought it, did you not?

A. Yes, sir.

• • • • • • •

[fol. 407] Redirect examination.

By Mr. Raywid:

Q. Mr. Fretz, in October and September of 1956, what facilities in the Norfolk area were available for the unloading of grain ships for these dead vessels?

A. Well, the only facilities at that time available were our facilities at Sewells Point.

Q. And do you charge for those services?

A. Yes, sir.

Q. Did you charge the Government for these services?

A. Yes, sir.

Q. Did you state that that was the only discharging facility in the area?

A. For that type of vessel that I know of. Now—yes, sir, the only conventional facility, I should say.

• • • • • • •

[fol. 410] By the Court:

Q. Somewhere down the line Commodity Credit invoices Continental Grain, I suppose, for the purchase of the grain; isn't that true?

A. Yes, sir.

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[fol. 450] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 451]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7986

WILLIAM J. ROPER, Libellant, Appellant,

—versus—

UNITED STATES OF AMERICA, Respondent-Petitioner; CONTINENTAL GRAIN COMPANY, Respondent-Impleaded, Petitioner; and JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATION, Respondent-Impleaded, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

WALTER E. HOFFMAN, *District Judge*.

Argued January 7, 1960.

Before: SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Sidney H. Kelsey for Appellant, and Carl C. Davis and Alan Raywid, Attorneys, Department of Justice, (George Cochran Doub, Assistant Attorney General, Joseph S. [fol. 452] Bambacus, United States Attorney, and Samuel D. Slade, Attorney, Department of Justice, on brief) for Appellee, United States of America.

OPINION—August 30, 1960

HAYNSWORTH, Circuit Judge:

The foreman of a gang of stevedores was injured when there was a rupture of a block on machinery attached to

a grain elevator, but partially lowered into the hold of a deactivated vessel owned by the United States. Under the Suits in Admiralty Act[1] he filed a libel against the United States. This action resulted in the usual petition to implead the granary, with which the United States had contracted for the unloading of the vessel, and a further petition by the granary to implead the stevedore, the employer of the injured man, with which it had contracted for the incidental stevedoring work. The District Court dismissed the libel after finding that the United States was not negligent and had not warranted that the machinery of the granary was "seaworthy."

The principal question is whether the owner of a deactivated vessel warrants to a stevedore employed by a granary the condition of the granary's unloading machinery. We agree with the District Court that it does not.

The Harry Lane, a Liberty ship owned by the United States, was deactivated in 1945. Her supplies, stores, and nautical instruments were removed. Her boilers, engines and pipes were drained, flushed with preservatives or filled with grease. The tail shaft and propeller were locked and [fol. 453] the rudder fixed amidship. Her cargo gear and tackle were stripped, her winches drained and the packing removed from the pistons. Her Coast Guard Certificate of Inspection was lifted and the biannual Coast Guard inspection suspended. She was then relegated to the James River Reserve Fleet, a "moth ball fleet." She could not be operated again as a commercial vessel without a major overhaul and relicensing and recertification.

There she remained until the price support program for wheat resulted in such surpluses that the storage facilities for grains were taxed. She, with a number of other "mothballed" vessels, was then pressed into service as a floating warehouse. She was modified to provide additional ventilation to her holds to protect the grain which was expected to be stored there for a long period.

In June 1954, the Harry Lane was towed to the Norfolk & Western grain elevator at Norfolk, loaded with surplus grain and returned to the Reserve Fleet. She remained

[1] 46 USCA § 741 et seq.

there until September 1956, when she was again towed to the Norfolk & Western grain elevator for the purpose of discharging the grain she had taken on more than two years earlier.

This use of the vessel was under a general storage agreement between Continental Grain Company, the lessee of the Norfolk & Western grain elevator, and Commodity Credit Corporation supplemented by specific agreements for the utilization of the storage space in deactivated vessels of the Reserve Fleet. Continental, in turn, had a contract with Atlantic and Gulf Grain Stevedoring Associates pursuant to which Atlantic and Gulf supplied the necessary stevedoring services.

[fol. 454] Norfolk & Western's elevator was equipped with a "Marine leg," a device for unloading grains. It is a large piece of equipment, permanently affixed to the elevator and to the dock. It is incapable of lateral movement, but, when a ship is properly placed beneath it, the mouth of the leg may be lowered into the hold until it is in contact with the grain. The marine leg is, basically, a housing containing a system of endless-belt, grain-carrying conveyers. These conveyers elevate the grain through the leg and carry it horizontally into the elevator.

When the grain has been removed to the point that the mouth of the leg is on the bottom of the hold and the elevation of the grain in the corners and remote areas of the hold has been so reduced that the grain no longer flows to the leg, it is necessary to bring such remaining grain to the leg and its elevating machinery. For this purpose, the leg is equipped with four plows or grain shovels. Each of these plows is connected, through a bridle, to a line which runs through a block attached to a pad eye at one of the corners of the leg, near the mouth, and thence, through other blocks to one of several small drum winches, high in the leg but controlled by the longshoremen in the hold by means of a clutch line.

The procedure is for a longshoreman to walk the plow away from the leg and place it in any desired location. When the plow has been placed, the drum winch is engaged through the clutch line. As the drum takes up the plowline, it draws the plow, and the grain in front of it, back to the leg.

On the day of his injury, Roper was supervising a crew of stevedores operating the grain plows. He undertook to [fol. 455] demonstrate to one of them a more efficient use of the plow. During the course of this demonstration, after the drum winch had been engaged and while the plowline was in tension, a strap holding the plowline block near the mouth of the leg broke, and the block flew into Roper's face.

Subsequent examination of the block disclosed the fact that its bushing had become worn, allowing the sheave to wobble and to contact the strap. The turnings of the sheave cut into the strap until the strap failed.

The block was unsafe for use, but the defect was not apparent upon a visual inspection of the assembled block. Indeed, Roper testified that one of his duties was to inspect the marine leg and its equipment prior to each use of it and that he had inspected it on the day that he was injured. The defect would have been apparent if the block had been disassembled. The disassembly of one block would not have been a complicated operation nor of long duration. If there was a duty to disassemble this block for inspection purposes, however, the duty would require the disassembly and minute inspection of all of the blocks, tackle and equipment used in association with the marine leg, perhaps the conveying machinery of the leg itself.

Under these circumstances, we think there is ample support for the finding that there was no showing of negligence on the part of the United States. It had engaged the expert operator of the machinery to do the work and it, in turn, had engaged the expert stevedores, who regularly worked with the machine, to perform the stevedoring service. The duty of care by the owner of a live ship to make her safe for the work to be done would hardly require it to make such a minute inspection of shore-based machinery not in its control as would have been required to disclose [fol. 456] the defect here. When the United States engaged competent people to do the work in which they were specialists, it was not required to verify for itself the effectiveness of the expert's maintenance of his specialized equipment.

The more important question is whether the United States, as owner of this deactivated vessel, warranted to the stevedore the soundness of the marine leg and its ap-

pliances. The District Court did not consider whether the usual warranty of seaworthiness would encompass this sort of shore-based, shore-attached equipment,[2] for it held there was no warranty of seaworthiness. Since we agree, we also confine ourselves to the holding that there was here no warranty of the seaworthiness of any unloading equipment.

It is now settled that a deactivated vessel in one of the "moth ball" fleets is, for these purposes, dead and withdrawn from navigation, so that there is no warranty of her seaworthiness.[3] Generally, the warranty of seaworthiness would not arise again until the vessel had been put through a major overhaul and she and her appliances and rigging had been reconditioned, restored and recertified.

In West, as here, the vessel was a deactivated Liberty ship which been in the moth ball fleet at Norfolk. She was towed from Norfolk to Philadelphia and there delivered to a shipyard for the purpose of being reconditioned and reactivated. She had aboard several men who became [fol. 457] her principal officers when she was recommissioned, but, though in the general employ of the owner, they had not signed on the vessel when, during the course of the reconditioning work, West was injured. These men had the right to inspect the work on behalf of the United States, but no right to control or supervise it. So here, the riding master had no authority to control or supervise the unloading operation, for his duties were limited to protection of the vessel from such hazards as fire and pilferage.[4]

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[2] See United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541. McKnight v. N. M. Paterson & Sons, Limited, D.C.N.D.Ohio, 181 F. Supp. 434.

[3] West v. United States, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161; see also Latus v. United States, 2 Cir., 277 F. 2d 265 (decided April 11, 1960); Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

[4] To accomplish the movement of the vessel from the Reserve Fleet to the elevator, the custodial agent sent aboard a riding master and six seamen, but the seamen did not sign on the vessel. They took with them six mooring lines, a heaving line, fire hose, a boarding ladder, safety lamps, a sounding rod, a lead line and

In deciding that there was no warranty of seaworthiness, the Supreme Court in West assumed that the injured man may have been doing seamen's work. It held there was no warranty to anyone, whatever the nature of the particular work he was doing, because the vessel affirmatively represented that she was not sound or fit for sea and the work was controlled by the shipyard. Here the ship affirmatively represented that her unloading equipment was not sound or fit for use and the work being done was controlled by the elevator, not by the ship or her owner.

Roper seeks to avoid the thrust of West by contending that the Harry Lane was returned to navigation when she was placed in service as a floating warehouse and moved from the Reserve Fleet to the grain elevator. He argues [fol. 458] that she was actually "carrying" cargo, that the movement was in furtherance of a commercial transaction and that she should be treated as if she had been reactivated and returned to service.

Of course, the United States was under a duty to exercise care to see that such things as the vessel's hatch covers and ladders, with which the stevedores must necessarily work, were reasonably safe for use. Should we ignore the fact that the vessel had no crew and carry Roper's contentions to their extremities, we could, at most, find a warranty that the ship, itself, her hatch covers and ladders were safe for their intended use.[5] No such limited use could give rise to a warranty of seaworthiness of unloading equipment, all of which was still in "moth balls" or completely removed.

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several electric light clusters. The seamen handled the mooring lines at the Reserve Fleet anchorage and at the elevator, but were then dismissed. The riding master remained employed to see that the ship was properly moored and kept clean, that the seals on her storerooms were not broken and that fire hazards were not created. He was not berthed or messed aboard. Indeed, he was not in command of the actual movement of the vessel, that having been under the control of the pilot captain of one of the two tug boats that moved the vessel.

[5] See, however, Hawn v. American S.S. Co., 2 Cir., 107 F. 2d 999; Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

Petterson v. Alaska Steamship Co.[6] and Rogers v. United States Lines[7] extended a live ship's warranty of her unloading equipment and gear to similar appliances brought aboard by the stevedore and used with the actual or implied permission of the ship. In such situations it is appropriate that the protection of the warranty not depend upon technicalities of title. Those cases in no way suggest, however, that a dead vessel which does not warrant its own equipment, and no one supposed it did, nevertheless warrants the machinery of a granary simply because it is used to unload the vessel. It is not the fact that an unloading operation is being performed which gives rise to the war- [fol. 459] ranty, but the fact that the vessel in service or dinarily represents she is sound and complete in her gear and equipment. There was no such representation here, for the vessel clearly represented itself as being entirely without operable equipment and usable gear. The ship which has no equipment or gear to warrant, does not warrant to others the soundness of machinery they may bring aboard.

We conclude that the owner of this dead vessel did not warrant to Roper the soundness of the granary's machinery.

Affirmed.

SOBELOFF, Chief Judge, dissenting:

The incontestable fact in this action by the longshoreman Roper against the S/S "Harry Lane" is that recovery is denied for injuries resulting from a defect in equipment actively in use in discharging cargo.

It is insisted, first, that there was no negligence in failing to inspect the gear. It is said that the burden of such inspection would be excessive and is therefore not required. There is no need to analyze this reasoning, for the point is immaterial, if the warranty of seaworthiness extends to this situation.

On the second branch of the case, based on the claimed warranty of seaworthiness, the majority concludes, in ac-

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[6] 9 Cir., 205 F. 2d 478, affirmed sub nom. Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798.

[7] 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120.

cordance with the shipowner's contention, that this was a "dead ship," which owed the plaintiff no such obligation. [fol. 460] This was no dead ship. The stereotype does not fit and will not survive analysis. A phrase, apt enough to describe an inert vessel undergoing major repairs in a shipyard, is completely misapplied to one in course of discharging cargo—cargo which she has just transported many miles for delivery precisely as any other cargo carrier might do.[1]

It does not matter that before making the journey the vessel was inactive, or that she might thereafter again resume inactivity. We find her fully active *on the day with* which we are concerned. Unlike a repair-worker called in to make a vessel fit for service, as in *West* v. *United States,* 361 U.S. 118 (1959), this plaintiff came aboard to perform a task rightly called traditional for seamen. Due to a failure of the equipment, he met with injury while thus engaged. Does this not meet the law's every requirement for a recovery on the ground of the vessel's unseaworthiness? I think it does, and recovery should not be denied because of the ship's status before the voyage in question or its expected later status. There is nothing logically inconsistent or legally incongruous in saying that the actual conditions at the time of the accident control, not the past or future.

The only similarity between the *West* case and this is that in each the ship had been for a time in the moth ball fleet. After this common point is established all resemblance between the two cases disappears. In *West* the vessel was delivered to a shipyard for major repairs and complete overhaul, without reservation of control or supervision over the work. In *West* there was no cargo aboard nor was any contemplated. She was in every real sense withdrawn com- [fol. 461] pletely from service. Here, however, the ship was taken from the moth ball fleet and put into service as a carrier to deliver grain to an elevator at a considerable distance. This is the outstanding feature of our case and gives the "Harry Lane" its distinctive status as a carrier of cargo. Roper sustained injuries while assisting in the actual dis-

[1] In the record the journey is described variously as "upstream" and "downstream," but it was stated at the oral argument that the vessel traversed a distance of more than twenty miles from the "moth ball" fleet to the grain elevator.

charge of that cargo. As this is a seaman's traditional work, he is entitled to the benefit of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953); *Alaska Steamship Co.* v. *Petterson,* 347 U.S. 396 (1954); *Rogers* v. *United States,* 347 U.S. 984 (1954); *Crumady* v. *The J. H. Fisser,* 358 U.S. 423 (1959).[2]

When the vessel in the *West* case was withdrawn from the moth ball fleet, if instead of being turned over to a contractor for "complete overhaul," it had been used to carry *cargo to a distant point* and the plaintiff met with injury while assisting in the unloading, I have no doubt the Supreme Court would have permitted recovery.[3]

Totally irrelevant is the meticulous description of the earlier removal of engines, etc. Reducing a fully equipped ocean-going vessel to the condition of a barge does not alter the case here, since on the occasion under inquiry the vessel had been towed, like a barge, with a load of grain and was in process of delivery when the gear failed. Barges [fol. 462] are not exempt from the obligation of seaworthiness. A vessel is defined in 1 U.S.C.A. section 3 as follows:

> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

See also: *Ex Parte Easton,* 95 U.S. 68 (1877) (a barge is a vessel such that there can arise a maritime lien for wharfage, enforceable by a District Court sitting in admiralty); *Ellis* v. *United States,* 206 U.S. 246 (1907) (holding that scows and floating dredges are vessels, and that the men working on them are seamen); *Goett* v. *Union*

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[2] With all deference to the opinion in *Hawn* v. *American S/S Co.*, 107 F.2d 499 (2nd Cir., 1939), it provides no authoritative guide. It was decided before *Sieracki* and the series of cases developing its doctrine.

[3] *Lawlor* v. *Socony-Vacuum Oil Company.* 275 F.2d 599 (2nd Cir., 1960), points out the limits of the *West* doctrine. It holds that a ship in the yard for annual overhaul merely, as distinguished from major repairs, warrants to those working upon it that it is seaworthy. The instant case involves not even annual overhaul or any work which may be said to take it out of navigation.

Carbide Corp., 361 U.S. 340 (1960) (a barge is a vessel to which the warranty of seaworthiness may be applicable); *Jeffrey* v. *Henderson Bros.*, 193 F.2d 589 (4th Cir., 1951); *Summerlin* v. *Massman Const. Co.*, 199 F.2d 714 (4th Cir., 1952).

Calling a cargo-carrying vessel a "floating warehouse" does not distinguish it from other water carriers or alter its obligations under maritime law for defects resulting in injury to those handling its cargo. So, in a sense, may any cargo-bearing vessel be called a "floating warehouse" while en route. Whatever the "Harry Lane's" status may have been while idle and with a cargo aboard, her status as a vessel in navigation became clear when she proceeded to deliver the grain to the elevator more than twenty miles away. She was then not significantly different from any vessel that had never been in the moth ball fleet.

It is suggested that the vessel had no crew, but this vessel had a crew of six under a riding master while en route. The question of "signing on" is of no importance [fol. 463] under these circumstances. The statutes relating to signing on, even if applicable, are for the benefit and protection of the seamen and have never been deemed to limit the scope of the term "seamen."

Moreover, even if the seamen aboard the vessel during its journey would, for some reason, not be considered a crew, this would be immaterial. The absence of a regular crew may be significant in the case of a ship undergoing repair, as in *West*, for it then may be a factor in determining whether the ship has been withdrawn from navigation. However, our ship was unquestionably in navigation, being actually used as a barge, and transporting a cargo. As previously pointed out, barges, with no men aboard during the journey, but with motive power furnished by a tug, are vessels in navigation whose seaworthiness is warranted. The men aboard the tug constitute the crew responsible for the barge.

If, upon completion of the voyage, the crew, whether travelling aboard the vessel itself or on the tug which has it in tow, withdraws and the longshoremen take over to make effective the purpose of the voyage by unloading the goods, these men stand in the shoes of the seamen and are

accorded the rights pertaining to seamen. Starting with *International Stevedoring* v. *Haverty*, 272 U.S. 50 (1926), through *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), to *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959), this principle has been recognized and maintained both in the interpretation of the general maritime law and in the construction of statutes enacted for the benefit of seamen generally. The point is no longer debatable.

[fol. 464] From the erroneous assumption that the vessel was a "dead ship" owing no warranty of seaworthiness, the United States as owner proceeds to the next erroneous assertion—a pure *non sequitur*—that the vessel in any event warranted nothing beyond her own equipment. This contention, however, was put to rest by the Supreme Court in *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954), where stevedore's tackle brought aboard was held appurtenant to the ship when used in the ship's service.

The Government also asserts that the marine leg, an endless belt extending into the bowel of the ship and lifting grain, is not to be considered a part of the ship's equipment, because it was land-based. The fallacy of this proposition is exposed by the holding in *Rogers* v. *United States Lines*, 347 U.S. 984 (1954), where the shipowner was held liable for the unseaworthiness of the stevedore's land fall runner used to augment the ship's gear. Also, in *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959), the defective equipment was shore-attached. There, a cargo of oil was being discharged from the vessel, and the company engaged for this purpose used its own pump and hoses to bring the oil ashore. This land-based equipment becoming defective, causing oil to spill on the deck, the plaintiff went aboard to make repairs. He slipped on the oil and fell to his death. The Supreme Court upheld the lower court's holding that he was protected by the warranty of seaworthiness. See also *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), where the detailed facts as to the injury itself are not revealed, but where apparently a similar situation was present.

It seems to me immaterial that the marine leg was attached at the top to the grain elevator on the pier. Its lower [fol. 465] end extended into the ship's hold and was actually

gathering the grain for discharge. The dominant fact is that it was equipment presently used in unloading. While it seems to me unnecessary to establish which part of the marine leg failed, it may be noted in passing that the part that broke and caused the injury was a strap holding a block attached to a scoop then collecting grain from the bottom of the hold and making it available to the conveyor belt.

Furthermore, since the vessel had no equipment of her own there is even less reason than ordinarily to relieve her of the established obligation to arrange for seaworthy equipment to handle cargo. If a vessel which has a full complement of gear of her own is not excused for failure of equipment brought aboard by the stevedore, as in *Petterson*, *a fortiori* she is no less vulnerable when by failure to provide equipment of her own she must rely on that supplied by others. The fact that the United States employed the grain company, which in turn employed the stevedore to perform the unloading, is immaterial. The obligation of the United States was non-delegable, *Seas Shipping Co.* v *Sieracki*, 328 U.S. 85 (1946); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959); and it was absolute, *Mitchell* v. *Trawler Racer Inc.*, 362 U.S. 539 (1960).

To summarize, Roper was aboard an active, not a dead vessel. To complete her journey it was necessary to unload the cargo of grain. While engaged in this traditional seamen's work Roper sustained injury due to faulty equipment assigned to his use. Under these circumstances, the Supreme Court has made it clear that one in the position of this plaintiff is entitled to indemnity from the vessel's owner. Therefore, I would reverse.

[fol. 466] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7986.

WILLIAM J. ROPER, Libellant, Appellant,

—vs.—

UNITED STATES OF AMERICA, Respondent-Petitioner; CONTINENTAL GRAIN COMPANY, Respondent-Impleaded, Petitioner; and JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATION, Respondent-Impleaded, Appellees.

DECREE—Filed and Entered August 30, 1960

Appeal from the United States District Court for the Eastern District of Virginia.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, United States Circuit Judge, Clement F. Haynsworth, Jr., United States Circuit Judge.

I dissent:

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

September 16, 1960, application of appellant for stay of mandate pending disposition of petition for writ of certiorari filed.

[fol. 466a]

ORDER STAYING MANDATE—Filed September 20, 1960

Upon the application of the appellant, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within thirty days from September 29, 1960.

September 19, 1960.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

[fol. 467] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 468]

SUPREME COURT OF THE UNITED STATES

No. 546—October Term, 1960

WILLIAM J. ROPER, Petitioner,

—vs.—

UNITED STATES ET AL.

ORDER ALLOWING CERTIORARI—January 23, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
NOV 25 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. [redacted]/16

WILLIAM J. ROPER,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

CONTINENTAL GRAIN COMPANY,

Respondent-Impleaded

and

JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATION,

Respondent-Impleaded, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO.....

WILLIAM J. ROPER,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

CONTINENTAL GRAIN COMPANY,

Respondent-Impleaded

and

JOHN W. McGRATH CORPORATION and
ARROW STEAMSHIP AGENCY, INC.,
t/a ATLANTIC AND GULF GRAIN STEVEDORING
ASSOCIATION,

Respondent-Impleaded,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner William J. Roper, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in Case

No. 7986, entered therein on August 30, 1960. This Judgment affirmed a Final Judgment of the United States District Court for the Eastern District of Virginia at Norfolk, dismissing Petitioner's Libel in Admiralty.

I. OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 282 F 2d ..... under the style of William J. Roper, Libellant-Appellant versus United States of America, Respondent-Appellee, et als. This Opinion is copied in the Appendix to this Petition on page 1, together with the dissenting Opinion of The Honorable Simon E. Sobeloff Chief Judge of the Court.

II. JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on August 30th, 1960. The Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. (1)

III. QUESTION PRESENTED

1. The petitioner Roper, a longshoreman gang foreman was injured at Norfolk, Virginia, when a steel strap holding a block on a grain chute from which a line was running to a detachable scoop or grain plow collecting grain from the bottom of the hold of the vessel HARRY LANE broke, striking Roper in his face. The HARRY LANE was owned by the Government and had been used to store grain while at its ship anchorage in the James River. The grain was sold by the Government to Continental Grain Company and the Government had the vessel towed in navigable waters down the James River

and through the Chesapeake Bay to discharge the grain to a grain elevator while the vessel was lying in navigable waters at the Norfolk Grain Elevator Pier. The Government had never relinquished its control over the vessel to anyone, but had maintained a Master and crew aboard to aid in navigation for the voyage and during unloading operations. The vessel was engaged in a purely commercial transaction at the time Roper was injured. The grain was discharged by lowering a grain chute through which an endless belt ran from the elevator into the holds of the ship carrying the grain up from the hold into the elevator at the pier. The grain chute had a detachable scoop or plow which was being used in the hold by longshoreman Roper, to which was attached a line running through a block on the end of the marine leg or grain chute which pulled the scoop over the bottom of the hold towards the mouth of the chute scooping up grain residue thereon. The District Court held that the vessel was withdrawn from navigation at the time Roper was injured and did not owe Roper the warranty of seaworthiness. The two Judge majority of three of the Court of Appeals for the Fourth Circuit affirmed, with the Chief Judge dissenting.

The ultimate question presented by the decision of the Court of Appeals is whether or not a shipowner owes a longshoreman the warranty of seaworthiness for a vessel formerly deactivated and withdrawn from navigation when the longshoreman is injured after the vessel is placed into navigation for commercial purposes, without relinquishing control of the vessel to anyone but discharging her cargo while lying in navigable water, although her motive power was "moth-balled" at the time.

2. The subsidiary question involved along with the determination of the ultimate question is whether or not

the shipowner owes the warranty of seaworthiness for equipment attached to shore on one end but resting aboard ship on the other end and used by the vessel in unloading and discharging the vessel's cargo.

IV. STATEMENT

Roper, a longshoreman, filed his libel against the United States as owner of the vessel HARRY LANE pursuant to Title 46, U. S. C. A., Sec. 741 et. seq., known as the Suits in Admiralty Act, for his personal injuries sustained. Previously the HARRY LANE stored with a cargo of Government grain had been laid up in the James River Anchorage, her motive power "mothballed" and withdrawn from navigation . The Commodity Credit Corporation sold the grain to the Continental Grain Company which in turn contracted with Roper's employer, Atlantic and Gulf Stevedores for stevedore services to discharge the grain to Continental's Grain Elevator at Norfolk. For the voyage from the James River Anchorage to Norfolk, approximately 20 miles, the Government employed a Master with licenses unlimited for all oceans together with a crew of six to assist in navigation of the vessel while being towed by a tug to Norfolk, down the navigable waters of the James River through the Chesapeake Bay to the Norfolk Grain Pier. The voyage was made without incident and the vessel was made fast to the pier. A grain chute or marine leg, the universal modern method of discharging grain was used, one end of which was attached to the elevator and the other end laid into the hold of the ship through which an endless belt ran carrying the grain up into the elevator. Since July, 1956 the Government had unloaded 28 of its grain ships with this equipment at Norfolk. At the end of the chute a detachable scoop or plow was provided to which a line ran through a block

held by a steel strap, this scoop being detached and let out, thereafter being pulled by the leg's machinery scooping the residue of grain on the bottom of the hold to the mouth of the leg. While using the detachable scoop scraping the bottom of the ship's hold, the steel strap holding the block broke, striking Roper in the face. The block was admittedly worn out, defective and unsafe allowing it's wobbling sheave to cut the strap as a result of which the block flew off. The Master admitted it was his duty to look out for safety on the ship. He duly noted Roper's injuries in the ship's log book. The duties of the Master and seamen required them to tend the ship's lines, place lights and aid in the navigation of the vessel. The Master stated that Roper while assisting in the discharge of the grain was doing "one of the things that historically was the job of seamen up until the eighteenth century." The vessel was at her dock in navigable waters solely for the purpose of a commercial transaction, discharging her cargo and in no sense were any repairs being done or any other activities except discharging cargo. The Government retained complete control over the vessel at all times during the unloading, the ship's crew tending lines and other duties. There was no contention below of relinquishment of control.

The Master admitted that no inspection whatsoever was ever made of the grain discharging equipment, the grain scoop or the blocks or machinery of the marine leg. Roper's employer, Atlantic and Gulf Stevedores, had brought the marine leg and grain discharging equipment aboard the vessel solely to perform their stevedoring services in unloading the same. The District Court held it was clear that the vessel was engaged in a commercial venture lying in navigable waters with Roper performing longshore duties and otherwise entitled to the warranty of sea-

worthiness but nevertheless held that the United States had withdrawn the vessel from navigation and by applying West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L.Ed. 2d 161, the warranty is not owed Roper. A majority of two of a three Judge Court of Appeals affirmed holding that West was applicable, with the Chief Judge dissenting, contending that West was inapplicable and that the warranty extended to Roper, pointing out a plain conflict in principle with the West decision of this Court and with the decision of the Second Circuit in Lawlor vs. Socony Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960), cert. den. 363 U. S. 844.

V. REASONS FOR GRANTING THE WRIT

1. There is a clear and direct conflict in principle between the decision of the Court of Appeals in this action and the decision of the Supreme Court of the United States in West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L.Ed. 2d 161 and with the Second Circuit's decision of Lawlor vs. Socony Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844. In West v. United States supra, the Government's vessel previously deactivated in the mothball fleet in the James River was towed to the shipyard at Philadelphia and turned over to it for the purposes of overhauling and reactivation, complete control over the vessel being relinquished to the shipyard. West, a shoreside employee of a repair subcontractor was injured during the reactivation work. This Court held that the voyage to Philadelphia was for the specific purpose of delivering the vessel to the shipyard contractor to render her seaworthy, the Government turning over complete control of the vessel to the shipyard for such repair purposes and the warranty of seaworthiness was not owed. Further it was held that the complete over-

haul repairs were not ship's work and as such required the vessel to be turned over to the shipyard in order to render her seaworthy. This Court held that the focus should be upon the status of the ship at the time, the pattern of repairs and the work to be done to determine whether the warranty of seaworthiness applied to an injured shore-based worker.

The status of the vessel HARRY LANE here has no similarity whatsoever to the status of the MARY AUSTIN in the West decision, as is pointed out by Chief Judge Sobeloff in his dissent below.

Mr. Justice Clark in rendering the Opinion of this Court in West stated on pages 164, 165 of 4 L. Ed. 2d:

> "On the other hand, the vessels involved in the cases depended upon by petitioners[2] were, at the time of the injury, in the hands and under the control of the owner or charterer and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to a voyage. **** But no such situation is present here. The Mary Austin, as anyone could see, was not in maritime service. She was undergoing major repairs and complete renovation, as the petitioner knew. Furthermore, he took his orders from the contractor, not the shipowner. He knew who was in control. This undertaking was not "ship's work" but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. ****It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive

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Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208, 34 S. Ct. 733, 51 LRA NS 1157, (1914); International Stevedoring Co. v. Haverty, 272 US 50, 71 L ed 157, 47 S. Ct. 19 (1926); Pope & Talbot Inc. v. Hawn, 346 US 406, 98 L ed 143, 74 S. Ct. 202 (1953); Alaska S. S. Co. v. Petterson, 347 US 396, 98 L ed 798, 74 S. Ct. 601 (1954); Crumady v. The Joachim Hendrik Fisser, 358 US 423, 3 L ed 2d 413, 79 S. Ct. 445, (1959).

nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen are doing on shipboard at the moment of injury.***"

Chief Judge Sobeloff in his dissent below lays his finger on the error of the majority in petitioner's case stating:

"This was no dead ship. The sterotype does not fit and will not survive analysis. A phrase, apt enough to describe an inert vessel undergoing major repairs in a shipyard, is completely misapplied to one in course of discharging cargo – cargo which she has just transported many miles for delivery precisely as any other cargo carrier might do.

It does not matter that before making the journey the vessel was inactive, or that she might thereafter again resume inactivity. We find her fully active on the day with which we are concerned. Unlike a repair-worker called in to make a vessel fit for service, as in West v. United States, 361 U. S. 118, (1959), this plaintiff came aboard to perform a task rightly called traditional for seamen. Due to a failure of the equipment, he met with injury while thus engaged. Does this not meet the law's every requirement for a recovery on the ground of the vessel's unseaworthiness? I think it does, and recovery should not be denied because of the ship's status before the voyage in question or its expected later status. There is nothing logically inconsistent or legally incongruous in saying that the actual conditions at the time of the accident control, not the past or future."

We believe that it is clear that the decision of the Court of Appeals in this case is wrong and that there is a direct and clear conflict in principle between that decision and the decision of this Court in West, supra.

In the Second Circuit decision of Lawlor vs. Socony

Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844, the vessel was brought to the shipyard for its annual inspection and overhauling and shoreside worker Lawlor came aboard and was injured by a defective ladder. The Court stated on page 604 of 275 F. 2d:

> "We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision of this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (Lyon v. United States, 2 Cir., (1959), 265 F 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (Berge, supra), nor a wholly deactivated vessel from the "mothball fleet" (West, supra), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul."

The Second Circuit held that the warranty of seaworthiness extended to Lawlor as there was no measurable loss of control over the vessel by the owner, the character of the work was incidental repairs and such as usually done by seamen and further the continued presence of the crew aboard performing their customary work. This Court denied certiorari on this decision in 363 US 844.

We think it clear that the decision of the Court of Appeals below is in direct conflict in principle with that of

the Second Circuit in Lawlor, supra, and that the decision in this case is plainly wrong.

2. The subsidiary question involved with the determination of the ultimate question is whether or not the shipowner owes the warranty of seaworthiness for equipment attached to shore on one end but resting aboard ship on the other end and used by the vessel in unloading and discharging the vessel's cargo.

The majority in the decision below while holding that the warranty of seaworthiness was not owing to Roper yet they agreed with the District Court's dicta that the United States as owner did not warrant the soundness of the marine leg and its appliances which were shore attached but which were also ship attached and used for discharging cargo. This Court has recently held that the warranty of seaworthiness to an injured shoreside worker extended to cover shorebased equipment. The Tungus v. Skovgaard, 358 US 588 (1959); Rogers v. United States Lines, 347 US 984. (1954) and Pope & Talbot vs. Hawn, 346 US 406 (1953).

VI. SUMMARY AND CONCLUSION

It is respectfully stated that the decision of the Court of Appeals for the Fourth Circuit in petitioner's case is in clear, direct and substantial conflict in principle with the decision of this Court in West v. United States, 361 US 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 and further conflicts in principle with the Second Circuit decision in Lawlor v. Socony Vacuum Oil Company, 275 F 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844, making it of utmost importance that this Court review the decision of the Court of Appeals in petitioner's case as the same tends to

create uncertainty as to the rights of all similar litigants, further tending to confuse the issues as to the extension of the warranty of seaworthiness in similar cases. In addition the lower Court decision is plainly wrong.

Wherefore, petitioner respectfully prays that this Petition be granted and that a Writ of Certiorari issue, and that this Honorable Court review and determine petitioner's rights herein and that the decision of the Court of Appeals may be reversed.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7986

William J. Roper, Libellant,
Appellant,

versus

United States of America, Respondent-Petitioner;
Continental Grain Company, Respondent-Impleaded,
Petitioner; and John W. McGrath Corporation and
Arrow Steamship Agency, Inc., t/a Atlantic and
Gulf Grain Stevedoring Association,
Respondent-Impleaded,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued January 7, 1960. Decided August 30, 1960.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Sidney H. Kelsey for Appellant, and Carl C. Davis and Alan Raywid, Attorneys, Department of Justice, (George Cochran Doub, Assistant Attorney General.

Joseph S. Bambacus, United States Attorney, and Samuel D. Slade, Attorney, Department of Justice, on brief) for Appellee, United States of America.

HAYNSWORTH, Circuit Judge:

The foreman of a gang of stevedores was injured when there was a rupture of a block on machinery attached to a grain elevator, but partially lowered into the hold of a deactivated vessel owned by the United States. Under the Suits in Admiralty Act[1] he filed a libel against the United States. This action resulted in the usual petition to implead the granary, with which the United States had contracted for the unloading of the vessel, and a further petition by the granary to implead the stevedore, the employer of the injured man, with which it had contracted for the incidental stevedoring work. The District Court dismissed the libel after finding that the United States was not negligent and had not warranted that the machinery of the granary was "seaworthy."

The principal question is whether the owner of a deactivated vessel warrants to a stevedore employed by a granary the condition of the granary's unloading machinery. We agree with the District Court that it does not.

The Harry Lane, a Liberty ship owned by the United States, was deactivated in 1945. Her supplies, stores, and nautical instruments were removed. Her boilers, engines and pipes were drained, flushed with preservatives or filled with grease. The tail shaft and propeller were locked and

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[1] 46 USCA § 741 et seq.

the rudder fixed amidship. Her cargo gear and tackle were stripped, her winches drained and the packing removed from the pistons. Her Coast Guard Certificate of Inspection was lifted and the biannual Coast Guard inspection suspended. She was then relegated to the James River Reserve Fleet, a "moth ball fleet." She could not be operated again as a commercial vessel without a major overhaul and relicensing and recertification.

There she remained until the price support program for wheat resulted in such surpluses that the storage facilities for grains were taxed. She, with a number of other "moth-balled" vessels, was then pressed into service as a floating warehouse. She was modified to provide additional ventilation to her holds to protect the grain which was expected to be stored there for a long period.

In June 1954, the Harry Lane was towed to the Norfolk & Western grain elevator at Norfolk, loaded with surplus grain and returned to the Reserve Fleet. She remained there until September 1956, when she was again towed to the Norfolk & Western grain elevator for the purpose of discharging the grain she had taken on more than two years earlier.

This use of the vessel was under a general storage agreement between Continental Grain Company, the lessee of the Norfolk & Western grain elevator, and Commodity Credit Corporation supplemented by specific agreements for the utilization of the storage space in deactivated vessels of the Reserve Fleet. Continental, in turn, had a contract with Atlantic and Gulf Grain Stevedoring Associates pursuant to which Atlantic and Gulf supplied the necessary stevedoring services.

Norfolk & Western's elevator was equipped with a "Marine leg," a device for unloading grains. It is a large piece of equipment, permanently affixed to the elevator and to the dock. It is incapable of lateral movement, but, when a ship is properly placed beneath it, the mouth of the leg may be lowered into the hold unit it is in contact with the grain. The marine leg is, basically, a housing containing a system of endless-belt, grain-carrying conveyers. These conveyers elevate the grain through the leg and carry it horizontally into the elevator.

When the grain has been removed to the point that the mouth of the leg is on the bottom of the hold and the elevation of the grain in the corners and remote areas of the hold has been so reduced that the grain no longer flows to the leg, it is necessary to bring such remaining grain to the leg and its elevating machinery. For this purpose, the leg is equipped with four plows or grain shovels. Each of these plows is connected, through a bridle, to a line which runs through a block attached to a pad eye at one of the corners of the leg, near the mouth, and thence, through other blocks to one of several small drum winches, high in the leg but controlled by the longshoremen in the hold by means of a clutch line.

The procedure is for a longshoreman to walk the plow away from the leg and place it in any desired location. When the plow has been placed, the drum winch is engaged through the clutch line. As the drum takes up the plowline, it draws the plow, and the grain in front of it, back to the leg.

On the day of his injury, Roper was supervising a crew of stevedores operating the grain plows. He undertook to

demonstrate to one of them a more efficient use of the plow. During the course of this demonstration, after the drum winch had been engaged and while the plowline was in tension, a strap holding the plowline block near the mouth of the leg broke, and the block flew into Roper's face.

Subsequent examination of the block disclosed the fact that its bushing had become worn, allowing the sheave to wobble and to contact the strap. The turnings of the sheave cut into the strap until the strap failed.

The block was unsafe for use, but the defect was not apparent upon a visual inspection of the assembled block. Indeed, Roper testified that one of his duties was to inspect the marine leg and its equipment prior to each use of it and that he had inspected it on the day that he was injured. The defect would have been apparent if the block had been disassembled. The disassembly of one block would not have been a complicated operation nor of long duration. If there was a duty to disassemble this block for inspection purposes, however the duty would require the disassembly and minute inspection of all of the blocks, tackle and equipment used in association with the marine leg, perhaps the conveying machinery of the leg itself.

Under these circumstances, we think there is ample support for the finding that there was no showing of negligence on the part of the United States. It had engaged the expert operator of the machinery to do the work and it, in turn, had engaged the expert stevedores, who regularly worked with the machine, to perform the stevedoring service. The duty of care by the owner of a live ship to make her safe for the work to be done would hardly require it to make such a minute inspection of shore-based machinery not in its control as would have been required to disclose

the defect here. When the United States engaged competent people to do the work in which they were specialists, it was not required to verify for itself the effectiveness of the expert's maintenance of his specialized equipment.

The more important question is whether the United States, as owner of this deactivated vessel, warranted to the stevedore the soundness of the marine leg and its appliances. The District Court did not consider whether the usual warranty of seaworthiness would encompass this sort of shore-based, shore-attached equipment,[a] for it held there was no warranty of seaworthiness. Since we agree, we also confine ourselves to the holding that there was here no warranty of the seaworthiness of any unloading equipment.

It is now settled that a deactivated vessel in one of the "moth ball" fleets is, for these purposes, dead and withdrawn from navigation, so that there is no warranty of her seaworthiness.[a] Generally, the warranty of seaworthiness would not arise again until the vessel had been put through a major overhaul and she and her appliances and rigging had been reconditioned, restored and recertified.

In West, as here, the vessel was a deactivated Liberty ship which had been in the moth ball fleet at Norfolk. She was towed from Norfolk to Philadelphia and there delivered to a ship yard for the purpose of being reconditioned and reactivated. She had aboard several men who

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[a] See United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541. McKnight v. N. M. Paterson & Sons, Limited, D.C.N.D.Ohio, 181 F. Supp. 434.

[a] West v. United States, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161; see also Latus v. United States, 2 Cir., 277 F. 2d 265 (decided April 11, 1960); Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

became her principal officers when she was recommissioned, but, though in the general employ of the owner, they had not signed on the vessel when, during the course of the reconditioning work, West was injured. These men had the right to inspect the work on behalf of the United States, but no right to control or supervise it. So here, the riding master had no authority to control or supervise the unloading operation, for his duties were limited to protection of the vessel from such hazards as fire and pilferage.[4]

In deciding that there was no warranty of seaworthiness, the Supreme Court in West assumed that the injured man may have been doing seamen's work. It held there was no warranty to anyone, whatever the nature of the particular work he was doing, because the vessel affirmatively represented that she was not sound or fit for sea and the work was controlled by the shipyard. Here the ship affirmatively represented that her unloading equipment was not sound or fit for use and the work being done was controlled by the elevator, not by the ship or her owner

Roper seeks to avoid the thrust of West by contending that the Harry Lane was returned to navigation when she was placed in service as a floating warehouse and moved from the Reserve Fleet to the grain elevator. He

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[4] To accomplish the movement of the vessel from the Reserve Fleet to the elevator, the custodial agent sent aboard a riding master and six seamen, but the seamen did not sign on the vessel. They took with them six mooring lines, a heaving line, fire hose, a boardingladder, safety lamps, a sounding rod, a lead line and several electric light clusters. The seamen handled the mooring lines at the Reserve Fleet anchorage and at the elevator, but were then dismissed. The riding master remained employed to see that the ship was properly moored and kept clean, that the seals on her storerooms were not broken and that fire hazards were not created. He was not berthed or messed aboard. Indeed, he was not in command of the actual movement of the vessel, that having been under the control of the pilot captain of one of the two tug boats that moved the vessel.

argues that she was actually "carrying" cargo, that the movement was in furtherance of a commercial transaction and that she should be treated as if she had been reactivated and returned to service.

Of course, the United States was under a duty to exercise care to see that such things as the vessel's hatch covers and ladders, with which the stevedores must necessarily work, were reasonably safe for use. Should we ignore the fact that the vessel had no crew and carry Roper's contentions to their extremities, we could, at most, find a warranty that the ship, itself, her hatch covers and ladders were safe for their intended use.[6] No such limited use could give rise to a warranty of seaworthiness of unloading equipment, all of which was still in "moth balls" or completely removed.

Petterson v. Alaska Steamship Co.[6] and Rogers v. United States Lines[7] extended a live ship's warranty of her unloading equipment and gear to similar appliances brought aboard by the stevedore and used with the actual or implied permission of the ship. In such situations it is appropriate that the protection of the warranty not depend upon technicalities of title. Those cases in no way suggest, however, that a dead vessel which does not warrant its own equipment, and no one supposed it did, nevertheless warrants the machinery of a granary simply because it is used to unload the vessel. It is not the fact that an unloading operation is being performed which gives rise to the war-

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[6] See, however, Hawn v. American S.S. Co., 2 Cir., 107 F 2d 999; Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

[6] 9 Cir., 205 F. 2d 478, affirmed sub nom. Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798.

[7] 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120.

ranty, but the fact that the vessel in service ordinarily represents she is sound and complete in her gear and equipment. There was no such representation here, for the vessel clearly represented itself as being entirely without operable equipment and usable gear. The ship which has no equipment or gear to warrant, does not warrant to others the soundness of machinery they may bring aboard.

We conclude that the owner of this dead vessel did not warrant to Roper the soundness of the granary's machinery.

Affirmed.

SOBELOFF, Chief Judge, dissenting:

The incontestable fact in this action by the longshoreman Roper against the S/S "Harry Lane" is that recovery is denied for injuries resulting from a defect in equipment actively in use in discharging cargo.

It is insisted, first, that there was no negligence in failing to inspect the gear. It is said that the burden of such inspection would be excessive and is therefore not required. There is no need to analyze this reasoning, for the point is immaterial, if the warranty of seaworthiness extends to this situation.

On the second branch of the case, based on the claimed warranty of seaworthiness, the majority concludes, in accordance with the shipown'er contention, that this was a "dead ship," which owed the plaintiff no such obligation.

"This was no dead ship. The sterotype does not fit and will not survive analysis. A phrase, apt enough to describe an inert vessel undergoing major repairs in a shipyard, is completely misapplied to one in course of discharging cargo —cargo which she has just transported many miles for delivery precisely as any other cargo carrier might do.[1]

It does not matter that before making the journey the vessel was inactive, or that she might thereafter again resume inactivity. We find her fully active on the day with which we are concerned. Unlike a repair-worker called in to make a vessel fit for service, as in *West* v. *United States*, 361 U.S. 118 (1959), this plaintiff came aboard to perform a task rightly called traditional for seamen. Due to a failure of the equipment, he met with injury while thus engaged. Does this not meet the law's every requirement for a recovery on the ground of the vessel's unseaworthiness? I think it does, and recovery should not be denied because of the ship's status before the voyage in question or its expected later status. There is nothing logically inconsistent or legally incongruous in saying that the actual conditions at the time of the accident control, not the past or future."

The only similarity between the *West* case and this is that in each the ship had been for a time in the moth ball fleet. After this common point is established all resemblance between the two cases disappears. In *West* the vessel was delivered to a shipyard for major repairs and complete overhaul, without reservation of control or supervision over the work. In *West* there was no cargo aboard nor was any contemplated. She was in every real sense withdrawn com-

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[1] In the record the journey is described variously as "upstream" and "downstream," but it was stated at the oral argument that the vessel traversed a distance of more than twenty miles from the "mothball" fleet to the grain elevator.

pletely from service. Here, however, the ship was taken from the moth ball fleet and put into service as a carrier to deliver grain to an elevator at a considerable distance. This is the outstanding feature of our case and gives the "Harry Lane" its distinctive status as a carrier of cargo. Roper sustained injuries while assisting in the actual discharge of that cargo. As this is a seaman's traditional work, he is entitled to the benefit of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953); *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954); *Rogers* v. *United States*, 347 U.S. 984 (1954); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959).[2]

When the vessel in the *West* case was withdrawn from the moth ball fleet, if instead of being turned over to a contractor for "complete overhaul," it had been used to carry cargo to a distant point and the plaintiff met with injury while assisting in the unloading, I have no doubt the Supreme Court would have permitted recovery.[3]

Totally irrelevant is the meticulous description of the earlier removal of engines, etc. Reducing a fully equipped ocean-going vessel to the condition of a barge does not alter the case here, since on the occasion under inquiry the vessel had been towed, like a barge, with a load of grain and was in process of delivery when the gear failed. Barges

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[2] With all deference to the opinion in *Hawn* v. *American S/S Co.*, 107 F.2d 499, (2nd Cir., 1939), it provides no authoritative guide. It was decided before *Sieracki* and the series of cases developing its doctrine.

[3] *Lawlor* v. *Socony-Vacuum Oil Company*, 275 F.2d 599 (2nd Cir., 1960), points out the limits of the *West* doctrine. It holds that a ship in the yard for annual overhaul merely, as distinguished from major repairs, warrants to those working upon it that it is seaworthy. The instant case involves not even annual overhaul or any work which may be said to take it out of navigation.

are not exempt from the obligation of seaworthiness. A vessel is defined in 1 U.S.C.A. section 3 as follows:

> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

See also: *Ex Parte Easton*, 95 U.S. 68 (1877) (a barge is a vessel such that there can arise a maritime lien for wharfage, enforceable by a District Court sitting in admiralty); *Ellis* v. *United States*, 206 U.S. 246 (1907) (holding that scows and floating dredges are vessels, and that the men working on them are seamen); *Goett* v. *Union Carbide Corp.*, 361 U.S. 340 (1960) (a barge is a vessel to which the warranty of seaworthiness may be applicable); *Jeffrey* v. *Henderson Bros.*, 193 F. 2d 589 (4th Cir., 1951); *Summerlin* v. *Massman Const. Co.*, 199 F. 2d 715 (4th Cir., 1952).

Calling a cargo-carrying vessel a "floating warehouse" does not distinguish it from other water carriers or alter its obligations under maritime law for defects resulting in injury to those handling its cargo. So, in a sense, may any cargo-bearing vessel be called a "floating warehouse" while en route. Whatever the "Harry Lane's" status may have been while idle and with a cargo aboard, her status as a vessel in navigation became clear when she proceeded to deliver the grain to the elevator more than twenty miles away. She was then not significantly different from any vessel that had never been in the moth ball fleet.

It is suggested that the vessel had no crew, but this vessel had a crew of six under a riding master while en route. The question of "signing on" is of no importance

under these circumstances. The statutes relating to signing on, even if applicable, are for the benefit and protection of the seamen and have never been deemed to limit the scope of the term "seamen."

Moreover, even if the seamen aboard the vessel during its journey would, for some reason, not be considered a crew, this would be immaterial. The absence of a regular crew may be significant in the case of a ship undergoing repair, as in *West*, for it then may be a factor in determining whether the ship has been withdrawn from navigation. However, our ship was unquestionably in navigation, being actually used as a barge, and transporting a cargo. As previously pointed out, barges, with no men aboard during the journey, but with motive power furnished by a tug, are vessels in navigation whose seaworthiness is warranted. The men aboard the tug constitute the crew responsible for the barge.

If, upon completion of the voyage, the crew, whether travelling aboard the vessel itself or on the tug which has it in tow, withdraws and the longshoremen take over to make effective the purpose of the voyage by unloading the goods, these men stand in the shoes of the seamen and are accorded the rights pertaining to seamen. Starting with *International Stevedoring* v. *Haverty*, 272 U.S. 50 (1926), through *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), to *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959), this principle has been recognized and maintained both in the interpretation of the general maritime law and in the construction of statutes enacted for the benefit of seamen generally. The point is no longer debatable.

From the erroneous assumption that the vessel was a "dead ship" owing no warranty of seaworthiness, the United States as owner proceeds to the next erroneous assertion—a pure *non sequitur*—that the vessel in any event warranted nothing beyond her own equipment. This contention, however, was put to rest by the Supreme Court in *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954), where stevedore's tackle brought aboard was held appurtenant to the ship when used in the ship's service.

The Government also asserts that the marine leg, an endless belt extending into the bowel of the ship and lifting grain, is not to be considered a part of the ship's equipment, because it was land-based. The fallacy of this proposition is exposed by the holding in *Rogers* v. *United States Lines*, 347 U.S. 984 (1954), where the shipowner was held liable for the unseaworthiness of the stevedore's land fall runner used to augment the ship's gear. Also, in *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959), the defective equipment was shore-attached. There, a cargo of oil was being discharged from the vessel, and the company engaged for this purpose used its own pump and hoses to bring the oil ashore. This land-based equipment becoming defective, causing oil to spill on the deck, the plaintiff went aboard to make repairs. He slipped on the oil and fell to his death. The Supreme Court upheld the lower court's holding that he was protected by the warranty of seaworthiness. See also *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), where the detailed facts as to the injury itself are not revealed, but where apparently a similar situation was present.

It seems to me immaterial that the marine leg was attached at the top to the grain elevator on the pier. Its lower

end extended into the ship's hold and was actually gather ing the grain for discharge. The dominant fact is that it was equipment presently used in unloading. While it seems to me unnecessary to establish which part of the marine leg failed, it may be noted in passing that the part that broke and caused the injury was a strap holding a block attached to a scoop then collecting grain from the bottom of the hold and making it available to the conveyor belt.

Furthermore, since the vessel had no equipment of her own there is even less reason than ordinarily to relieve her of the established obligation to arrange for seaworthy equipment to handle cargo. If a vessel which has a full complement of gear of her own is not excused for faliure of equipment brought aboard by the stevedore as in *Petterson, a fortiori* she is no less vulnerable when by failure to provide equipment of her own she must rely on that supplied by others. The fact that the United States employed the grain company, which in turn employed the stevedore to preform the unloading, is immaterial. The obligation of the United States was non-delegable. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959); and it was absolute, *Mitchell* v. *Trawler Racer Inc.*, 362 U.S. 539 (1960).

To summarize, Roper was aboard an active, not a dead vessel. To complete her journey it was necessary to unload the cargo of grain. While engaged in this traditional seamen's work Roper sustained injury due to faulty equipment assigned to his use. Under these circumstances, the Supreme Court has made it clear that one in the position of this plaintiff is entitled to indemnity from the vessel's owner. Therefore, I would reverse.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 546

WILLIAM J. ROPER, PETITIONER

v.

UNITED STATES OF AMERICA, CONTINENTAL GRAIN COMPANY, AND JOHN W. MCGRATH CORPORATION AND ARROW STEAMSHIP AGENCY, INC., TRADING AS ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Maryland (R.P. 2–16)[1] is reported at 170 F. Supp. 763. The opinions in the United States Court of Appeals for the Fourth Circuit (Pet. App. 1–15) are reported at 282 F. 2d 413.

[1] Page references to petitioner's appendix in the court of appeals will be preceded by "R.P."; to the Government's appendix, by "R.G."; to the transcript, by "Tr." Other parts of the record will be referred to as "R."

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1960. The petition for a writ of certiorari was filed on November 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warranty of seaworthiness was applicable to an employee of a stevedoring company engaged at a grain pier in unloading a dead, deactivated vessel utilized solely for the storage of grain and towed to the grain pier for the unloading.

STATEMENT

This action under the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742, was instituted by petitioner against the United States as owner of the Liberty ship, S.S. HARRY LANE (R. 2). The United States impleaded the Continental Grain Company which in turn impleaded Atlantic and Gulf Stevedoring Associates (R. 29, 59). The libel sought recovery of damages for injuries sustained by petitioner, a foreman employed by the stevedoring company, when a marine leg permanently affixed to the pier gave way while being operated in the discharge of surplus grain stored aboard the deactivated HARRY LANE (R. 2–3). The libel asserted as its basis of liability (1) that the vessel was unseaworthy because the marine leg was defective and (2) that the United States was negligent (R. 3). The undisputed basic facts, as found by the district court and the court of appeals, are as follows:

After World War II, the HARRY LANE was completely deactivated and placed in the James River moth-ball fleet (R.G. 42). In furtherance of the deactivating process, all supplies, stores, and nautical instruments were removed; the pipes, machinery, boilers, and winches were drained and flushed with special preservatives or filled with grease; the steering gear was drained; the propeller and tail shaft were secured; and the rudder till was locked. Additionally, the cargo gear and tackle were stripped and placed in sealed storerooms or between decks; the booms were permanently secured in their sockets; the winches were drained; and the packing was removed from the piston rods (R.G. 38–40). The Coast Guard Certificate of Inspection (necessary for operation as a vessel in navigation) was lifted and the biannual Coast Guard inspections were suspended (R.G. 42).

In 1954, the HARRY LANE, as well as other vessels in the moth-ball fleet, was called upon for storage and warehousing of surplus grain that had accumulated under the agricultural price support program (R.G. 42). These vessels were equipped with special ventilating systems, unlike those found on vessels in active navigation, to preserve the grain properly for long term storage (R.G. 71). The deactivated HARRY LANE was towed to the Norfolk and Western Grain elevator at Norfolk, Virginia, and, after being loaded with surplus grain, was returned to the moth-ball fleet in the James River (R.G. 42, 70).

The HARRY LANE remained with the fleet until September 1956, when she was again towed as a dead

deactivated vessel to the same grain elevator, where the surplus grain was discharged (R.G. 42, 70). She was moved from her mooring in the James River to Norfolk by tugs which provided the entire motive power and steering (R.G. 23–24, 68). A riding master and six men were put aboard her for the handling of mooring lines (R.G. 68), but the command of the ship and her movement was in the tugboat captain (R.G. 23, 24). The only equipment available to the riding master and his men were brought aboard specifically for the movement and consisted of lines, fire hose, boarding ladder, sounding rod, lamps, and electric light clusters that could be powered from shore (R.G. 25, 26). The riding master's duties consisted only of seeing that the ship was properly moored and kept reasonably clean, the storerooms remained sealed, and fire hazards prevented (R.G. 24). Upon arrival at the grain piers, the riding gang was dismissed (R.G. 36, 43). The riding master remained employed during the storage handling period, but was not messed or berthed aboard the dead vessel (Tr. 158). After the unloading was completed, the vessel was returned to the James River fleet (R.G. 42, 70).

The grain was stored in the vessel under an agreement between Continental Grain Company, the lessee of the grain elevator, and Commodity Credit Corporation (Tr. 163, 358–359). Continental, in turn, contracted with Atlantic and Gulf Grain Stevedoring Associates for stevedoring services in connection with the unloading of the vessel (R.G. 54, 58). Petitioner

was employed by the stevedoring company as a foreman and was directing the operation of a "marine leg" at the time he was injured (R.G. 11–13).

The marine leg was permanently attached to and was an integral part of the Continental Grain Company elevator (R.G. 30–31). It was operated by Continental or by expert grain stevedoring companies which it engaged (R.G. 58–59, 67). The marine leg consisted of a large metal housing containing a continuous belt with buckets or scoops which dip into the grain, carrying it up through the housing into the elevator storage bins (R.G. 1–5, 59, R.P. 3). From a control booth, located on the pier, an operator employed by the Continental Grain Company raised and lowered the leg into the hold of the ship which had been placed directly beneath the leg (R.G. 19, 31, 58–59). In the hold was a team of grain handlers under the direction of a foreman who guided the leg downward into the hold and placed it in contact with the grain by the use of wooden plows attached to the marine leg and powered through a system of winches, blocks, and pad-eyes; the handlers guided the grain in the recesses of the hold to the bottom of the marine leg (R.G. 2–5, 12–13, 15–16, 20–21).

Petitioner, an experienced grain handling specialist and skilled in operating the marine leg, was the foreman of the team controlling the operation of the leg in the hold of the HARRY LANE during the unloading operations (R.G. 11–12). He had worked with this particular marine leg over an extended period of time and, as a part of his duties, often inspected the equipment (R.G. 8, 14, 17). On October 2, 1956,

as petitioner was engaged in his duties as foreman, the strap on a block in the marine leg plow system snapped and he was injured by the freed block (R.G. 14–15; Tr. 71–72, 176).

Following trial, the district court entered judgment for the Government. It held, *inter alia*, that the warranty of seaworthiness did not extend to a deactivated vessel of the moth-ball fleet which had been towed to a grain pier merely to facilitate the removal of surplus grain stored aboard.[2]

The court of appeals affirmed (Sobeloff, C.J., dissenting), holding (Pet. App. 6) that this case fell under the rule of *West* v. *United States*, 361 U.S. 118, that

> a deactivated vessel in one of the "moth ball" fleets is * * * dead and withdrawn from navigation, so that there is no warranty of her seaworthiness. Generally, the warranty of seaworthiness would not arise again until the vessel had been put through a major overhaul and she and her appliances and rigging had been reconditioned, restored and recertified.

ARGUMENT

The district court and the court of appeals correctly held that, under the controlling principle of unseaworthiness established in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and applied by this Court in subsequent decisions, including *West* v. *United States*,

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[2] As above noted, p. 2, *supra*, petitioner also alleged that the Government was negligent. This contention, however, was rejected by both the district court (R.P. 4) and the court of appeals (Pet. App. 5). Petitioner has not pursued the contention in this Court.

361 U.S. 118, a shipowner is not liable in the circumstances of this case. The decisions below conform with the rule of those cases, *i.e.*, that, while the warranty of seaworthiness is not restricted to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards on a ship "in active maritime service."[1] And, contrary to petitioner's position, there is no conflict with the decisions of other courts of appeals which have applied this principle to varying factual patterns. There is no occasion for further review.

1. This Court's recent decision in *West* v. *United States*, 361 U.S. 118, controls the issues raised in this petition. It was there held that no warranty of seaworthiness runs to an employee of an independent contractor who is working in a vessel that is not in the active maritime service but has been laid up for several years in the moth-ball fleet. In addition, the Court ruled that, in the absence of power in the owner either to supervise or control the work in which an injured employee is engaged, the independent contractor rather than the shipowner must answer for any injuries caused by defects created by the work. It is of no significance that in *West* the independent contractor was repairing the dead vessel and that here the contractor was emptying the moth-balled vessel of grain stored in its hold. The operative factor is that in neither instance did there exist a vessel in the active maritime service. Likewise, the fact that the HARRY LANE had grain aboard is irrelevant; the grain

[1] *West* v. *United States*, 361 U.S. at 121.

was there for the purpose of storage and not as incident to carriage by an active vessel. Similarly, the towing to the pier did not transform the vessel from a floating warehouse into a live ship.

2. Contrary to petitioner's suggestion (Pet. 9), the rationale of the courts below is wholly consistent with *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (C.A. 2), certiorari denied, 363 U.S. 844. In *Lawlor*, the vessel was undergoing an annual overhaul, with no major changes or repairs called for; the ship was very much alive. Also, the vessel had a full crew aboard and the shipowner was in general control of the ship. 275 F. 2d at 601. Thus, the operative facts in *Lawlor* are far removed from those in the present case, where the ship was completely deactivated and in control of the independent contractors for the purpose of the unloading which had not been completed. *Lawlor* and the present case, therefore, are consistent with each other and correctly implement the rule reiterated in *West* as to the extension of the warranty of seaworthiness to shore-based employees, 361 U.S. at 122:

> *It would appear that the focus should be upon the status of the ship,* the pattern of the repairs, and the extensive nature of the work contracted to be done * * * [emphasis added].

The Second Circuit also considered this question in *Latus* v. *United States*, 277 F. 2d 264, certiorari denied, 364 U.S. 827, holding that the fact that the operation being performed on a dead vessel is similar to those performed on a live vessel is immaterial, for,

in the words of Judge Learned Hand (277 F. 2d at 266):

> a ship is either fitted for her duties in all respects, or she is not fitted at all. This does not mean that before she is fit her owner may not be liable to those who come aboard because of his neglect to provide for their safety; but that is quite another matter from imposing upon him the conventional warranty of seaworthiness.' * * *

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

GEO. S. LEONARD,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
SHERMAN L. COHN,
Attorneys.

JANUARY 1961.

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[1] Petitioner suggests (Pet. 10) that this case presents another question, *viz.*, whether the warranty of seaworthiness (assuming it is applicable at all) attaches to equipment permanently attached to the grain elevator on shore. This question, however, was reached by neither the district court (R.P. 7) nor the court of appeals (Pet. App. 6). Moreover, petitioner's contention has no merit. As in *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, and *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938, the equipment used here was not of a type normally employed by seamen aboard ship. On the other hand, in the *Pope & Talbot* line of cases relied on by petitioner (Pet. 10), traditional seamen's equipment was being used.

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No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1961

WILLIAM J. ROPER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
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WILLIAM H. ORRICK, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 16

WILLIAM J. ROPER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 6–17) is reported at 170 F. Supp. 763. The opinions in the United States Court of Appeals for the Fourth Circuit (R. 97–108) are reported at 282 F. 2d 413.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1960 (R. 109). The petition for a writ of certiorari was filed on November 25, 1960, and granted on January 23, 1961 (R. 110; 365 U.S. 802). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a shipowner warrants the seaworthiness of a deactivated, admittedly unseaworthy vessel of the moth-ball fleet which is out of navigation and is being used for the non-maritime purpose of storing wheat.

2. Whether a shipowner's warranty of "seaworthiness" extends to a shore structure in the form of a shoreside crane or "marine leg" which forms no part of any ship's equipment but is a permanent and integral part of a pier and grain elevator attached to the real estate.

STATEMENT

Petitioner brought this libel *in personam,* pursuant to the Suits in Admiralty Act, against the United States as owner of the deactivated liberty ship, SS HARRY LANE (R. 2–4). The libel sought damages for injuries sustained by petitioner while aboard the HARRY LANE removing storage grain from that vessel to a grain elevator, and was based upon the allegations that the injuries were due to the "unseaworthiness" of a "marine leg" and the negligence of employees of the United States (R. 3).

The basic facts, found by the district court and upheld on appeal by the court of appeals, may be summarized as follows:

After the cessation of hostilities in World War II (in December 1945), the SS HARRY LANE became a member of the deactivated "moth-ball" fleet located on the James River, near Norfolk, Virginia (R. 8). The deactivation included the complete stripping from the vessel and storage ashore of the vessel's

supplies, stores, nautical instruments, cargo gear and tackle, the drainage of all pipes and machinery, and the securing of the rudder, tail shaft, and propeller to prevent turning (R. 8, 57–58). The deactivated vessel was not certified or licensed to operate as a vessel in navigation (R. 8).

With the large surpluses of grain in this country in 1954, storage facilities were scarce. The Commodity Credit Corporation entered into a general warehousing agreement with the Continental Grain Company, for the handling of grain, including the storage of grain aboard deactivated vessels of the "moth-ball" fleet (R. 8–9). In June 1954, the SS HARRY LANE was loaded with storage grain under that agreement, and then returned to its place with the other vessels of the "moth-ball" fleet (R. 8–9). She was not moved again until over two years later, when in September 1956, she was brought back to the same grain elevator for the purpose of discharging the storage grain (R. 9, 89). While serving in the place of a grain warehouse she was considered "a storage bin, that's all" (R. 42).

For the movement to the grain elevator, the United States employed a custodial agent, American Foreign Steamship Agency, which in turn hired a gang consisting of a "riding master" and six men to handle lines. The line handlers did not sign on as seamen for the vessel, and the equipment aboard her consisted of mooring lines, heaving lines, fire extinguishers and hose, all of which were intended to be used for the purpose of this movement only (R. 6–7, 10, 101–102). The ship was towed by tugs, and the

"riding master" was subject to the orders of the captain aboard the tugboat had no license as a ship's officer and who was in control of her movement (R. 42, 102). When the vessel arrived at the grain piers, the riding gang was dismissed, but the "riding master", as a watchman, remained to see that the ship was properly moored and kept clear and free of fire hazards (R. 10, 102). The elevation of the storage grain from the ship to the elevator was under the exclusive control of the Continental Grain Co., and the "riding master" had nothing to do with the operation (R. 7, 16, 46).*

On these facts, both courts below found that the SS HARRY LANE had been withdrawn from service as a ship in 1945, and had never been returned. The HARRY LANE had not been used to transport grain but only to store it in the stead of a grain elevator. She was not in navigation at the time of petitioner's injury (R. 12–17; 101–103).

The "marine leg," a particular type of shoreside crane, was an integral part of the grain elevator permanently attached to the pier and leased and maintained by Continental Grain Co. It consisted of a large metal housing containing motors and a conveyer belt with scoops. One end of the shoreside crane or "leg" may be lowered into the hold of the vessel, where its scoops dip into the grain, carry it up the housing of the "leg" and dump it on to another belt at the pier end of the housing, which

*In its original answer to the libel, the United States admitted the allegation that the vessel was "being sailed as a cargo carrier" (R. 2, 5), but this was amended at the trial, on motion of the government, to withdraw the admission. See the Appendix, *infra*, pp. 36–37.

then conveys the grain (through a series of belts and chutes) into the storage bins of the elevator (R. 7, 99).

The "marine leg" was equipped with four plows or "grain shovels" powered by the leg, which were used to bring grain from remote corners of a hold to the scoops (R. 7). The marine leg was raised and lowered by an operator on shore at the top of the leg in a control booth, but was incapable of lateral movement (R. 7, 99). When the grain was removed from each hold of the vessel, she was warped back and forth along the pier to align another hatch and hold with the position of the shoreside crane or "leg" (R. 49). Continental Grain Co. owned and maintained the "marine leg," and employed its operator (R. 7). The "riding master" of the ship had no right or authority to inspect the "marine leg" or its appurtenances (R. 48). The operation of a "marine leg" required the service of an expert stevedore trained in the use of such equipment (R. 16). The "marine leg" was uniquely shore attached equipment, and could not form any part of the equipment of vessels which go to sea (R. 10).

Under its contract with the United States, Continental Grain Company agreed to remove the grain stored aboard the SS HARRY LANE and place it in its grain elevators. In turn, Continental Grain had an agreement with Atlantic and Gulf Grain Stevedoring Associates for necessary stevedoring services (R. 7).

On October 2, 1956, petitioner was the foreman of the gang of Atlantic and Gulf stevedores using the

"marine leg" to elevate the storage grain from the SS HARRY LANE to the grain elevator. After the grain had been unloaded to the point where it no longer flowed to the leg, the longshoremen were utilizing the grain shovels or "plows" of the leg for the purpose of bringing the remainder of the grain to the mouth of the leg. Petitioner was demonstrating the proper method of utilizing the plow of the "marine leg" to one of the longshoremen, when a block, a part of the shoreside crane or marine leg, broke and struck petitioner and injured him. The cause of the injury was a latent defect in this block attached on the corner of the "marine leg" (R. 7–8).

Although the basis for his suit was this defect in the shoreside crane or "marine leg," petitioner brought this libel for negligence and "unseaworthiness" against the United States, instead of suing Continental Grain Company, which owned and operated the leg (R. 2–4). In its answer, the United States generally denied the allegations of negligence and unseaworthiness and specifically denied that the shoreside crane or "marine leg" (as a part of the pier and grain elevator) was any part of the ship's equipment (R. 4–5; see also fn. *, *supra*, p. 4). The United States impleaded Continental Grain, which in turn impleaded Atlantic and Gulf (R. 98).

The District Court found that the United States was not negligent, and that, in view of the HARRY LANE's removal from navigation, the use of the dead vessel for storage rather than as a cargo carrier, the nature of petitioner's duties, the absence of the shipowner's control, and the nature of the shoreside

crane or "marine leg" involved, the warranty of "seaworthiness" could not apply[1] (R. 16). Accordingly, a final decree was entered in favor of the United States, and the impleading petitions of the United States against Continental Grain and of Continental Grain against Atlantic and Gulf were dismissed without prejudice (R. 17–18).

The Court of Appeals for the Fourth Circuit affirmed in each respect[2] (R. 97–103). Chief Judge Sobeloff dissented on the ground that the HARRY LANE was in navigation at the time of the injury, and the warranty of "seaworthiness" applies to all equipment used in unloading a vessel, even though it forms part of a shore structure and thus is equipment which does not and cannot go to sea (R. 103–108, particularly 106, 107–108).

SUMMARY OF ARGUMENT

The courts below properly declined to permit recovery by petitioner on the ground of the vessel's breach of an alleged warranty of seaworthiness.

A. Fully cognizant of the extension of the warranty of seaworthiness to shore-based workers in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, and subsequent decisions of this Court, the courts below were equally

[1] Since the District Court held that there was no warranty of seaworthiness because of all the circumstances, it found it unnecessary to decide whether a warranty could ever extend to equipment forming part of a pier, wharf or dock, such as the "marine leg", which is "equipment not found aboard ship during navigation" (R. 10).

[2] Similarly, the Court of Appeals did not reach the question of whether the warranty of a vessel in navigation extended to part of a shore structure (R. 101).

cognizant of the fact that those decisions dealt only with vessels in navigation and represented by the shipowners as warranted seaworthy for a voyage. The owner does not warrant the seaworthiness of deactivated vessels which have been withdrawn from navigation and are no longer in active maritime service. *West* v. *United States,* 361 U.S. 118. Nor can there be reliance on such a warranty where the vessel is patently unseaworthy. There are neither historical nor other considerations justifying the extension of the shipowner's burden of absolute liability from vessels warranted ready for the sea to those which are not represented or warranted to be seaworthy, but are known to be unseaworthy and withdrawn from navigation.

Petitioner was injured aboard the HARRY LANE, a deactivated vessel of the "moth ball" fleet which had been withdrawn from navigation and active maritime service, and was being used, not for the transportation of cargo, but only for the storage of grain, in lieu of a warehouse. Whether a vessel is in navigation or has been withdrawn from active maritime service is a question of fact. *Butler* v. *Whiteman,* 356 U.S. 271. Both courts below correctly found that the HARRY LANE was not in navigation, and there is no occasion in this case for departure from this Court's practice of accepting the concurrent factual findings of two lower courts.

B. There is no warranty of the "seaworthiness" of the parts of a shore structure, such as the "marine leg" here, which does not and cannot go to sea as a part of a vessel's equipment. The Court's decisions in *Alaska Steamship Co.* v. *Petterson,* 347 U.S. 396, and *Rogers* v. *United States Lines,* 347 U.S. 984, held

only that the warranty of seaworthiness applies to all equipment which is like ship's equipment and used in conjunction with ship's equipment in the place of basic ship's gear which the shipowner has failed to provide.

By contrast, the "marine leg" is part of a shore structure which cannot go to sea because it is permanently attached to the pier, and is wholly unlike any equipment used by vessels in navigation. In holding that a shore-based worker using specialized shore equipment is not performing work traditionally done by seamen, this Court, in *United Pilots Association* v. *Halecki,* 358 U.S. 613, strongly implied that the warranty of seaworthiness does not apply to such specialized shore equipment. Each court of appeals which has been confronted with the problem has, in accord with *Halecki,* denied recovery based upon claims of unseaworthiness of equipment which is not traditionally or commonly carried aboard a vessel as ship's equipment, and is not used as ship's equipment in place of gear traditionally furnished by the shipowner. *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938; *Fredericks* v. *American Export Lines,* 227 F. 2d 450 (C.A. 2); *McKnight* v. *N. M. Paterson & Sons,* 286 F. 2d 250 (C.A. 6), pending on petition for certiorari, No. 67, this Term.

There is no justification for extending the warranty of seaworthiness to shore-based equipment which is not the kind of equipment carried by a seagoing vessel—particularly to such shore-based equipment which is part of the real estate. The operation of the "marine leg", permanently attached to the

grain elevator, was work done only by stevedores, and never by seamen, and the hazards arising out of that operation did not originate with the ship or her equipment, but were due solely to defects in the granary's equipment. It would be anomalous to extend the warranty of the seaworthiness of a vessel and her equipment to such shore machinery, which is unlike ship's equipment and never did, or could, go to sea as part of the equipment of a vessel for a voyage.

Such an extension of the shipowner's warranty would make his liability dependent upon the chance of having his vessel unloaded at the particular time the shore equipment happened to break down.

There is no practical need for such an extension, because the longshoreman has adequate remedies under existing law which give him compensation for such injuries without regard to fault, as well as the traditional compensation for the *negligence* of the owner of the shore-based equipment.

ARGUMENT

THE COURTS BELOW PROPERLY DETERMINED THAT THE UNITED STATES DID NOT WARRANT THE "SEAWORTHINESS" OF A SHORE STRUCTURE SUCH AS A "MARINE LEG" USED IN UNLOADING GRAIN FROM A DEACTIVATED VESSEL REMOVED FROM NAVIGATION AND MARITIME SERVICE

A. THERE WAS NO WARRANTY OF "SEAWORTHINESS" OF THE HARRY LANE, WHICH WAS A DEACTIVATED AND UNSEAWORTHY VESSEL REMOVED FROM NAVIGATION AND MARITIME SERVICE

1. *This Court's decisions recognize a warranty of seaworthiness only as to vessels represented to be seaworthy for a voyage.*—In *Seas Shipping Co.* v. *Sie-*

racki, 328 U.S. 85, the Court extended the protection afforded by the shipowner's absolute warranty of a ship as seaworthy and properly equipped for a voyage from seamen to include longshoremen and other shore-based workmen employed by independent contractors when engaged in the performance of work incident to a ship's voyage. The rationale of this extension beyond shippers, passengers, and seamen, who are in privity of contract with the shipowner, is that such shore-workers, while not in privity of contract, are equally within the owner's representation of his vessel as seaworthy for the voyage. Further, the Court held that the stevedoring work of loading and unloading involved was an integral part of the voyage and was "Historically the work * * * of the ship's service, performed until recent times by members of the crew" (328 U.S. at 96).[3] Hence the Court concluded that the shipowner could not (by parcelling out, to intermediary employers, services incident to navigation which were traditionally performed by seamen) escape the consequences of his representation of the vessel as seaworthy for the voyage. "For these purposes he [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards" (328 U.S. at 99). Thus, he was entitled

[3] This factual premise has been disputed. Tetrault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 412–418 (1954). Since this Court has recently had occasion to re-examine the historical evolution of the doctrine of unseaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, we need not discuss the "dubious ancestry" (*United Pilots Association* v. *Halecki*, 358 U.S. 613, 616) of that doctrine.

to rely upon the shipowner's representation that the ship was seaworthy and safe.

Similarly, in each of the subsequent cases in which the Court has held that a warranty of seaworthiness had been made, relied on, and breached, the vessel was in navigation in active maritime service. Thus, in *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, a shore-based carpenter was allowed to recover for breach of the shipowner's representation when he received an injury while repairing a slight defect in the vessel's loading equipment so that the loading of the vessel for the voyage could continue. Similarly, *Alaska Steamship Co.* v. *Petterson,* 347 U.S. 396, involved an injury incurred while loading for a voyage, while *Rogers* v. *United States,* 347 U.S. 984, and *Crumady* v. *The Joachim Hendrik Fisser,* 358 U.S. 423, involved injuries incurred in unloading after a voyage. See, also, *The Tungas* v. *Skovgaard,* 358 U.S. 588, which concerned an injury in the course of repairing machinery during unloading from a voyage. As summarized by this Court recently, the preceding cases, in which the shipowner was held to have made and breached a warranty of seaworthiness, are all cases in which the vessels "* * * were in active maritime service in the course of loading or unloading cargo pursuant to voyages" (*West* v. *United States,* 361 U.S. 118, 121).[4]

By contrast, vessels which have been deactivated and withdrawn from the active maritime service of

[4] The cases in which the warranty of seaworthiness has been applied to members of a crew also involve vessels in active service, and injuries incident to a voyage. See, *e.g.*, *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539; *Michalic* v. *Cleveland Tankers*, 364 U.S. 325.

navigation, and do not have crew, operable ship's equipment, or a license to navigate, are not represented and warranted by their owners to be worthy and safe to go to sea but, on the contrary, are plainly represented to be unseaworthy. Consequently, there is no express or implied warranty by their owners that such vessels may be relied on as being seaworthy. *West* v. *United States,* 361 U.S. 118.[5]

2. *There is no justification for extending the doctrine of Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, *to cover work performed on a deactivated vessel known to be unseaworthy and out of navigation, and never represented as being seaworthy for a voyage.*— This Court and other federal courts have consistently recognized the distinction between a seaman who works on a vessel in navigation on a voyage (and which is thus represented and warranted to be seaworthy for that purpose), and one who works on a vessel which has been removed from active maritime service.[6] The fact that a vessel has been removed from active navigation bears closely upon whether one who works aboard her can be considered a "sea-

[5] In *United Pilots Association* v. *Halecki,* 358 U.S. 613, the Court refused to extend the warranty to a shore-based repairman who was fatally injured while cleaning a vessel's generators with carbon tetrachloride. The Court denied recovery on the ground that the shore-based worker was not doing work traditionally done by seamen, and therefore considered it unnecessary to decide whether there was any warranty of seaworthiness in the circumstances. 358 U.S. at 617.

[6] There is no meaningful distinction between the terms "in navigation" and "in active maritime service" and we use them interchangeably in this brief.

man" within the meaning and coverage of the Jones Act.

Thus, in *Desper* v. *Starved Rock Ferry*, 342 U.S. 187, this Court ruled that a man who had been employed during the summer months as a seaman on a fleet of motorboats carrying sightseers, who was reemployed during the following spring to help prepare the vessels for navigation, and who was injured in the course of such seasonal repair work, was not a "seaman" of a vessel within the purview of the Jones Act. "The distinct nature of the [seasonal repair] work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death." *Id.* at 191.

Similarly, in *Butler* v. *Whiteman*, 356 U.S. 271, the Court ruled that whether the vessel was in navigation was an element of the plaintiff's case which should be decided by the jury in determining whether he was a seaman and member of a crew so as to be entitled to recovery under the Jones Act. See, also, *Antus* v. *Interocean S.S. Co.*, 108 F. 2d 185 (C.A. 6); *Hawn* v. *American S.S. Co.*, 107 F. 2d 999 (C.A. 2); *Seneca Washed Gravel Corporation* v. *McManigal*, 65 F. 2d 779 (C.A. 2).

Since a deactivated vessel, which is out of navigation and active maritime service, is not only not warranted seaworthy for a voyage, but has no "seamen", the *Sieracki* doctrine, which was designed to give the shore-based worker the protection to which a seaman on a voyage is entitled "* * * because he is doing a seaman's work" (328 U.S. at 99), can have no application. Since a seaman's work is in aid of or incident

to navigation on a voyage, there is no seaman's work on a vessel which has been removed from navigation and deactivated. One who has a seaman's papers and has been to sea is not a seaman if he is employed at the time on a vessel out of navigation. Neither can a shore-based worker employed on such a vessel be deemed a seaman, to whom the shipowner makes the representation or warranty made to those whose vessels go to sea.

Accordingly, this Court and the lower courts have refused to find that there is any warranty of seaworthiness in respect of vessels which have been deactivated and removed from navigation, and are obviously not fit for sea. *West* v. *United States,* 361 U.S. 118; *Raidy* v. *United States,* 153 F. Supp. 777 (D. Md.), affirmed on opinion below, 252 F. 2d 117 (C.A. 4), certiorari denied, 356 U.S. 973; *Union Carbide Corp.* v. *Goett,* 256 F. 2d 449 (C.A. 4), vacated and remanded, 361 U.S. 340, on remand, 278 F. 2d 319 (adhering to original result), certiorari denied, 364 U.S. 826; *Latus* v. *United States,* 277 F. 2d 264 (C.A. 2), certiorari denied, 364 U.S. 827; *Noel* v. *Isbrandtsen,* 287 F. 2d 783 (C.A. 4), certiorari denied, 366 U.S. 975. These cases involved deactivated and unseaworthy vessels which were in the process of being made seaworthy for a future voyage, and, in *Noel,* a previously active vessel which was being deactivated and rendered unseaworthy.[7]

[7] Petitioner relies upon *Lawlor* v. *Socony Vacuum Oil Co., Inc.,* 275 F. 2d 599 (C.A. 2), certiorari denied, 363 U.S. 844, for the proposition "that *West* [*West* v. *United States, supra*] will be limited to its special facts" (Pet. Brief, p. 14). *Lawlor* merely holds that a vessel which was undergoing annual repairs,

3. ***The finding of the courts below that the HARRY LANE was not in navigation was correct, and should not be disturbed.***—Petitioner recognizes, as he must, that "the focus should be upon the status of the ship * * *" (*West* v. *United States,* 361 U.S. 118, 122) in determining whether there was any representation or warranty that the HARRY LANE was seaworthy (Pet. Brief, pp. 10–12). He contends, however, that, contrary to the findings, the vessel was in navigation and was in active maritime service (Pet. Brief, pp. 12–14). Similarly, the dissenting opinion in the court of appeals was grounded upon the vessel's "status as a vessel in navigation" (R. 106; see also 104). In short, the petitioner and the dissenting judge below appear to agree that a deactivated vessel which is not in navigation is not represented by her owner to be seaworthy, and that there thus can be no reliance on a warranty of the seaworthiness of such a vessel. The only disagreement on this point is whether in fact the HARRY LANE was in navigation at the time of petitioner's injury.

(*a*). It is now settled that this question of whether a vessel is in or out of navigation is a question of fact to be resolved by the finder of fact upon consideration of all of the relevant circumstances. *Butler* v. *Whiteman,* 356 U.S. 271. The district court so understood, and found as a fact that the

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consisting primarily of painting and finding and caulking leaks, and which maintained her full crew in control over the vessel, appeared to be in navigation with her owner representing and warranting her seaworthiness. The Second Circuit in *Lawlor* made no attempt to limit *West*, but merely applied the principles laid down in *West* to the facts before it.

HARRY LANE was not in navigation at the time of petitioner's injury (R. 13). That factual finding was, of course, affirmed by the court of appeals (R. 102–103).

This Court does not normally review the concurrent findings of fact by two courts below. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see also *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147; *The Germanic*, 196 U.S. 589. Petitioner's argument that the HARRY LANE was in navigation and that the United States therefore warranted her as seaworthy (even though it was known that she was not) ignores the critical point that the issue here is factual, and has been resolved by the concurrent findings of the courts below (Pet. Brief, pp. 13–18).

That there has been no "very obvious and exceptional showing of error" (*Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra*, 336 U.S. at 275) warranting a review of those concurrent findings is, we believe, apparent. The HARRY LANE had been totally deactivated and taken out of service in 1945. She was unfit and incapable of going to sea, and there were no plans to make her ready or fit for active maritime service. She was not used to transport cargo after 1945. She had no crew and no license to navigate. Her only service after 1945 was non-maritime, as a "storage bin" for the storage of grain. She was moved twice in the eleven years. In 1954 she was towed from her mooring down stream to the grain elevator, where she was filled with storage

grain, and then towed back up stream to her mooring. In 1956 she was again towed from her mooring to the grain elevator, where the storage grain was removed, at the identical point it had been placed in her, and then was towed back to her mooring. She was, as anyone could see, a deactivated vessel, unfit for the sea or for maritime service. "It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case." *West* v. *United States,* 361 U.S. 118, 122.

The fact that she had been, prior to petitioner's injury, towed from one point to another, while in an obviously unseaworthy state, certainly did not require a finding that she was in maritime employment or navigation. The deactivated vessel in *West* v. *United States,* 361 U.S. 118, had been towed a much greater distance (from the James River mooring to Philadelphia) and yet "* * * as anyone could see, was not in maritime service." 361 U.S. at 122.

(*b*). The only two lower court cases involving the same issue are in accord with the concurrent findings of the lower courts here. *Hawn* v. *American S.S. Co.,* 107 F. 2d 999 (C.A. 2); *Kissinger* v. *United States,* 176 F. Supp. 828 (E.D.N.Y.). In *Hawn* the owner of a vessel, which had not been in service all summer, decided to use her for the storage of soya beans over the winter. Plaintiff, who was hired by the day to handle her lines, was injured during the process of loading her with the beans, while he was assisting in warping her back and forth along the wharf, so that the grain chutes could reach the hatches. The Second Circuit, by a panel consisting of Judges Clark, Learned Hand, and Augustus N.

Hand, affirmed the determination that the vessel could not be considered in navigation because it was being used to store, rather than to transport, the beans. It therefore concluded that the vessel had no crew, and that plaintiff was not a member of a crew entitled to recovery under the Jones Act, but was only entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).

Petitioner, and the dissenting judge below, attempt to distinguish *Hawn* on the ground that it was decided before the decision of this Court in *Sieracki*[8] and therefore is no longer valid (Pet. Brief, p. 15; R. 105).[9] But, as the district court noted (R. 12), *Hawn* was cited with approval and relied upon by this Court in *Desper* v. *Starved Rock Ferry*, 342 U.S. 187, 191, a post-*Sieracki* decision. *Hawn* is therefore persuasive authority for the proposition that deactivated vessels used for the storage, rather than the transport, of goods are not in active maritime service, and are not in navigation.[10] More important, per-

[8] 328 U.S. 85.

[9] Petitioner also attempts to distinguish *Hawn* on the ground that the storage beans had not yet been placed aboard the vessel (Pet. Brief, p. 15). But if a vessel is not in active maritime service while she is in the process of being filled with a commodity for storage there is no reason to consider her in active service when the commodity in storage is in the course of being removed. Moreover, the attempted distinction is factually inaccurate, because the opinion makes it clear that the injury occurred "[i]n filling" the vessel, after she had been loading at the dock for several days. 107 F. 2d at 1000.

[10] Whether the finder of fact would be *permitted* to find that such a vessel was in navigation is not an issue in this case since both courts below have found the contrary.

haps, is the fact that the decisions in *Hawn* and *Kissinger* demonstrate that fair-minded fact-finders can reasonably conclude, as did the courts below, that the HARRY LANE was not in fact in navigation or in maritime service at the time of the petitioner's injury.

(*c*). Petitioner, and the dissenting judge below, base their argument that the vessel was in navigation upon an analogy to barges, contending, in effect, that the HARRY LANE was in active use as a barge, although concededly an inactive and obviously unseaworthy ship (Pet. Brief, p. 17; R. 105–106). While it is possible that a "hulk" or deactivated former ship, which is in regular employment for the transport of commodities, might be considered to be like a barge on a voyage and therefore warranted by her owner as seaworthy for such a voyage, that is not the situation in this case.[11]

The HARRY LANE was used only for the storage of grain and not to transport it (R. 8–9, 98). Ships which are in navigation are used to transport goods

[11] Moreover, as the court of appeals pointed out, if the owner of a deactivated vessel used as a barge were to warrant any of its equipment, it could in fairness only be required to warrant the equipment normally carried by a barge and not unloading equipment attached to a dock or pier which is not traditionally carried by barges (R. 102–103). Accord: *Union Carbide Corp.* v. *Goett*, 256 F. 2d 449 (C.A. 4), vacated and remanded, 361 U.S. 340; on remand, 278 F. 2d 319, certiorari denied, 364 U.S. 826 (where a barge which is unmanned during its normal operations was held seaworthy despite the absence of life preservers on the grounds, *inter alia*, that such equipment is unnecessary in its usual service.)

or passengers, or to assist in their carriage. By contrast to this normal maritime employment, the HARRY LANE was used as "a storage bin," in the place of a grain elevator or warehouse. Her use for storage was solely due to the shortage of grain storage facilities on shore. Except for the fact that she floats, her service as a storage bin was no more maritime than that of any grain warehouse. Similarly, petitioner's work in removing the grain was no more seaman's work than is the removal of grain from any other storage bin.

The position of petitioner and the dissenting judge below does not take account of these significant facts and erroneously refers to removal of the storage grain as the transportation of cargo (Pet. Brief, pp. 12, 13, 18; R. 104).[12]

Since the HARRY LANE was used solely as a warehouse for the storage of grain, and not to transport it, we believe that the two courts below were correct in their finding that she was not in active maritime service and not in navigation. At any rate, there was no "very obvious and exceptional showing of error" warranting departure from this Court's normal practice of accepting the concurrent factual findings of two lower courts.

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[12] The dissenting judge would have "* * * the actual conditions at the time of the accident control, not the past or future" (R. 104). Yet he asserts that the vessel had a "crew" while en route (R. 106). It is conceded that the six line handlers were employed by the day, were not boarded on the vessel, and were discharged before the accident (R. 10).

B. THERE IS NO WARRANTY OF "SEAWORTHINESS" AS TO A PART OF A SHORE STRUCTURE, SUCH AS THE "MARINE LEG" HERE, WHICH DOES NOT AND CANNOT GO TO SEA AS PART OF A VESSEL'S EQUIPMENT

The courts below also held that the United States as shipowner did not warrant the "seaworthiness" of the shoreside crane or "marine leg" which caused petitioner's injury (R. 16, 102–103). In so holding the district court relied upon "* * * the nature of the duties being performed by libellant, the type of equipment in use, the owner's lack of control over discharge operations, the vessel's removal from navigation, and the limited use of the ship for storage purposes * * *" (R. 16). Similarly, the court of appeals relied upon all the factual circumstances of this case in holding that there was no warranty of the seaworthiness of the "marine leg" (R. 101–103).

We have shown in Point A, *supra,* that the courts below were correct in their holding because there can be no warranty of seaworthiness as to vessels which, like the HARRY LANE, have been withdrawn from navigation and active maritime service and are known to be unseaworthy. That reason alone is enough for affirmance of the judgment below. We show in this Point that there is an independent reason requiring affirmance, namely, that there can be no representation or warranty of "seaworthiness" in respect of a part of a shore structure such as a shoreside crane or "marine leg," which was permanently attached to and a part of a grain elevator and its pier or

wharf, and was real estate which never was or could be a part of any ship's equipment."[13]

1. *No decisions of this Court have ever held that the shipowner warrants the "seaworthiness" of a part of a shore structure which does not and could not go to sea as part of a ship's equipment.*—Petitioner suggests that the *Petterson* and *Rogers* decisions of this Court[14] foreclose the question of whether the shipowner represents and warrants the "seaworthiness" of a part of a shore structure, such as the shoreside crane or "marine leg" here involved, which could never be a part of a ship's equipment and which could never go to sea (Pet. Brief, pp. 18–21; cf. R. 107–108). Analysis of these decisions, however, reveals that this question was not presented, discussed, or determined in those cases. On the contrary, there has been a strong implication by the Court that there is no warranty of seaworthiness in respect of such equipment.

(*a*). In *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, this Court affirmed, *per curiam*, and without

[13] Neither court below found it necessary to determine whether the fact that the equipment causing the injury here was a shore structure and part of the equipment of a granary, rather than the ship's equipment, was in itself sufficient ground for holding that there could be no warranty of its "seaworthiness" (R. 9–10, 101). As petitioner and the dissenting judge below recognized, however, in order to reach the conclusion that the United States did warrant the "seaworthiness" of the shoreside crane or "marine leg," it is necessary to find both that the United States warranted the seaworthiness of the HARRY LANE and that the warranty extended to part of a shore structure such as the "marine leg" (Pet. Brief, pp. 18–21; R. 107–108).

[14] *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396; *Rogers* v. *United States Lines*, 347 U.S. 984.

opinion, a decision of the Ninth Circuit holding the shipowner's warranty of seaworthiness applicable to a ship's block although it had been brought aboard ship by the stevedoring company, because it was "* * * the type of equipment commonly found as part of the gear of both ships and stevedoring firms," 205 F. 2d 478, 479.[15]

Similarly, in *Rogers* v. *United States Lines,* 347 U.S. 984, the Court reversed, *per curiam,* without opinion, and upon the petition for certiorari, a decision of the Third Circuit holding the warranty of seaworthiness did not include a wire (called a "land fall runner") although it was attached to and winding upon a ship's winch, 205 F. 2d 57. The fact that the wire was the kind of equipment normally provided by the shipowner aboard a ship as a part of ship's equipment was highlighted by the parallel use of the ship's own wire (runner) on the second of the ship's winches. *Ibid.* Petitioner's argument in *Rogers,* which this Court apparently accepted, was that the ship in that case had accepted and adopted the wire as an appurtenance, because the owner had failed to have available all of the basic ship's cargo gear which was necessary to her operation.[16]

[15] The stevedoring firm in that case had the usual option to use the contractor's gear or the gear of the ship. See 347 U.S. 396 (dissenting opinion).

[16] See Petition for a Writ of Certiorari, No. 471, October Term 1953, Second Reason for Granting the Writ, particularly pp. 22 and 23:

"* * * the presence of the wire runner was the ship's responsibility because under the maritime law the shipowner's obligation of seaworthiness is to *supply* as well as to keep in order

The Third Circuit's decision in *Rogers* was based upon the shipowner's lack of control over the unloading operation (and thus over the runner), while the Ninth Circuit's opinion in *Petterson* was devoted to the proposition that lack of control did not preclude the representation and warranty of the seaworthiness of everything used as ship's equipment. Certiorari was premised on the conflict between circuits as to whether lack of control precluded application of the shipowner's warranty of the seaworthiness of all ship's equipment.[17] This Court's decisions in *Rogers* and *Petterson* held merely that the warranty of seaworthiness applies to all equipment which is used as ship's equipment, is commonly carried aboard as ship's equipment, and is in substitution of the ship's equipment—although it may be owned by the stevedore, and the stevedore may be in control of its use in unloading. The Court held in effect that the shipowner cannot avoid his representation and warranty that he has furnished seaworthy ship's equipment by having an independent contractor furnish such equipment, just as he cannot avoid that obligation by having the contractor furnish the workmen for what is traditionally the work of seamen.[18]

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the appliances appurtenant to the ship" (*Id.* at p. 23—emphasis as in original).

[17] See 347 U.S. 396 (dissenting opinion), and *Lopez* v. *American-Hawaiian S.S. Co.*, 201 F. 2d 418 (C.A. 3).

[18] The Court's citation of *Sieracki* and *Hawn* is explainable on this ground, which is consistent with the common understanding that "* * * to constitute unseaworthiness the defect must be in the ship's hull, gear or stowage * * *". *Grillea* v. *United States*, 232 F. 2d 919, 922 (C.A. 2). See, also, *The Southwark*, 191 U.S. 1, 8–9.

In short, this Court held merely that equipment which is used as ship's equipment and thus has been, in effect, incorporated into the vessel's equipment is within the shipowner's warranty of the seaworthiness of that equipment. Each court of appeals which has considered this problem has so interpreted the Court's holdings. *Klimaszewski* v. *Pacific-Atlantic S.S. Co.*, 246 F. 2d 875 (C.A. 3); *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9); *McKnight* v. *N. M. Paterson & Sons*, 286 F. 2d 250, 251 (C.A. 6) affirming on opinion below, 181 F. Supp. 434 (N.D. Ohio), pending on petition for a writ of certiorari, No. 67, this Term; *Kent* v. *Shell Oil Company*, 286 F. 2d 746, 748 (C.A. 5); see *infra*, pp. 28–30.

In this case, by contrast, the "marine leg" is part of a shore structure which cannot go to sea because it is permanently attached to the pier, and is wholly unlike any equipment which is used by vessels in navigation (R. 10). See *infra*, pp. 31–32. *Petterson* and *Rogers* neither raised nor decided the issue presented by this case with respect to equipment which is plainly part of the real estate.[19]

The other decisions of this Court cited by petitioner and Chief Judge Sobeloff below have, we believe, no bearing on the issue. In *The Tungus* v. *Skovgaard*,

[19] The dissenting judge below states that the United States argued that, because the marine leg was "land based," the warranty is inapplicable (R. 107). However, the United States argued below, as it does here, that the warranty does not apply because the equipment is a shore structure and part of the real estate unlike ship's equipment, and because it was not used in substitution for the ship's equipment. See Brief of the United States in the Court of Appeals, pp. 38–40.

358 U.S. 588, the asserted breach of the warranty of seaworthiness (slipperiness due to oil) was of the vessel's deck and tank, not of any shore-based equipment such as was involved in *Petterson* and *Rogers*. Indeed, as the Third Circuit noted in the *Skovgaard* case, the libellant specifically alleged that the death was caused "by the [slippery] condition of the deck and tank and not by the [shore-based] instrumentality he intended to repair." 252 F. 2d 14, 19.[20] Similarly, the breach of warranty of seaworthiness in *Pope & Talbot* v. *Hawn*, 346 U.S. 406, was by a defective condition of the ship itself, an uncovered hatch hole.

(*b*). The only decision of this Court which bears upon the applicability of the owner's warranty of seaworthiness to shore-based equipment which is not identical to and in substitution for ship's equipment is *United Pilots Association* v. *Halecki*, 358 U.S. 613. Although the asserted unseaworthiness in that case was that of the ship itself, and not the special equipment brought aboard her by the shore-based worker to clean the ship's generators, the Court, in holding that the worker was not doing the type of work traditionally done by seamen, referred to and emphasized

[20] The case is inapplicable for the additional reason that neither the Third Circuit nor this Court determined whether there was any breach of a warranty of seaworthiness. The district court had dismissed the libel on the ground that a wrongful death action for unseaworthiness does not lie. The Third Circuit's decision, affirmed by this Court, was that the New Jersey Wrongful Death Act embraces a claim for unseaworthiness. 358 U.S. 588, 590. The Third Circuit remanded the case to the district court for further proceedings, expressly reserving "the question of the unseaworthiness of the vessel * * *." 252 F. 2d 14, 19.

the specialized nature of the equipment which was "* * * brought aboard the vessel for this special purpose" and was not "* * * connected with a ship's seagoing operations." 358 U.S. at 617. Since a man using such special equipment is not performing work traditionally done by seamen, the implication is clear that a defect in such equipment is not ship's equipment within the shipowner's warranty of equipment which is commonly or traditionally found aboard a ship as necessary for a voyage.

2. *The courts of appeals have refused to extend the warranty of seaworthiness to equipment which is not traditionally or commonly a part of a ship's gear.*— Following the implications of this Court's decisions in *Petterson* and *Halecki*, the three other courts of appeal which have been confronted with this problem have denied recovery based upon claims of unseaworthiness of equipment which, like the shoreside crane or "marine leg" here, is not traditionally or commonly carried aboard a vessel as ship's equipment. *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938; *Fredericks* v. *American Export Lines*, 227 F. 2d 450 (C.A. 2); *McKnight* v. *N. M. Paterson & Sons*, 286 F. 2d 250 (C.A. 6), pending on a petition for a writ of certiorari, No. 67, this Term.

In *Berryhill*, the Ninth Circuit denied the claim for breach of warranty by a ship repairman who was injured by a defect in a portable grinding wheel which was owned by the repair contractor and brought aboard by him to assist in the performance of the repair work. While the court relied in part

upon the kind of work being done, it also relied upon the nature of the equipment, which was not commonly ship's equipment. The court distinguished its decision in *Petterson* (205 F. 2d 478, affirmed *per curiam* and without opinion, 347 U.S. 396) on the ground, *inter alia,* that the defective block took the place of equipment usually furnished and required by a ship. This Court denied *Berryhill's* petition for certiorari.

Similarly, in *McKnight,* the Sixth Circuit refused to hold the warranty of seaworthiness included a shoreside crane which was, like the "marine leg" here, a part of the pier owned and operated by the stevedore, and was being used to unload newsprint from a vessel. It approved the district court's distinguishing this Court's decisions in *Petterson* and *Rogers* on the ground that the equipment in those cases was merely substituted for gear regularly found as a part of the gear of seagoing vessels (181 F. Supp. at 438–439). And in *Fredericks, supra,* the Second Circuit denied recovery of a claim for breach of warranty of seaworthiness based upon defects in a skid used to unload a vessel.[21] Consistently with the holdings of the courts of appeals, a district court has held that the warranty of seaworthiness does not apply to a shoreside crane or "marine leg" being used to load a barge. *Cockrell* v. *Mechling Barge Lines,* 192 F. Supp. 622 (S.D. Tex.).

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[21] The longshoreman in *Fredericks* was standing upon the dock at the time of his injury. However, the case is not distinguishable on that ground, since the Second Circuit had previously allowed recovery for breach of the warranty of seaworthiness of equipment resulting in injuries to longshoremen occurring ashore. 46 U.S.C. 740; *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, certiorari denied, 341 U.S. 904.

Petitioner has cited no case which has held that the warranty of seaworthiness includes shore-based equipment which is not traditionally and commonly part of a ship's gear. We have found only one such case. *Considine* v. *Black Diamond S.S. Corp.*, 163 F. Supp. 107 (D. Mass.). There, the district court (per Aldrich, J.) held that the warranty of seaworthiness included a "chisel truck" which was being used aboard a vessel to aid in handling cargo. Although the court expressed sympathy with the contention that the shipowner did not represent and warrant that such trucks were seaworthy for a voyage, and was able to find "no contrary logic, or social necessity, let alone legislative policy," 163 F. Supp. at 108, it believed the issue "essentially determined" by prior decisions, including *Halecki* v. *United Pilots Association*, 251 F. 2d 708 (C.A. 2), which was subsequently reversed by this Court, 358 U.S. 613.

3. ***There is no justification for extending the warranty of seaworthiness to shore-based equipment which is not the kind of equipment carried by a seagoing vessel.***—The doctrine of recovery for breach of the representation or warranty of the seaworthiness of a vessel and her equipment for a voyage, as applied to seamen and those who attend in their place, arose out of the seaman's status and the conditions of his service.

> He [the seaman] is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. [*Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103.]

And, as noted above, the doctrine was extended to the longshoremen because "[f]or these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 99. He was thought to be within the ambit of the same representation of the fitness of the vessel and its gear.

Petitioner here was not, of course, subject to the rigorous discipline of the sea nor was he required to rely on any representation by the shipowner. He was an experienced stevedore foreman who was in charge of the unloading of the HARRY LANE with the "marine leg" and whose duty it was to inspect the "marine leg", for which he had ample opportunity (R. 100, 35). He had in fact examined it on the very day of his injury (R. 100, 35). The "marine leg" was used to unload all vessels at Continental Grain's piers. It was used regularly by petitioner and other expert stevedores of Atlantic and Gulf Stevedoring Associates, which had a contract with Continental Grain Company to unload all vessels at the pier (R. 100, 71–72).[22] No ship's officer or seaman ever used or had a right to inspect the "marine leg," which was operated exclusively by petitioner and other employees of the granary and the stevedore

[22] There is no merit to the suggestion of the dissenting judge below that the injury in this case was somehow due to the fact that there was no unloading equipment aboard the vessel (R. 108). The "marine leg" was special equipment used to unload bulk cargoes from seaworthy vessels which had all necessary ship's equipment, as well as those like the HARRY LANE, which were unseaworthy and had no operable ship's equipment (R. 100, 71–72; see also Pet. Brief, p. 4).

(R. 72–73). The operation of the "marine leg" was work which seamen never do. Similarly, the hazards arising out of the operation of the "leg" were hazards never encountered by seamen, but only by stevedores. Those hazards did not originate with the ship or her equipment, but were due solely to possible defects in the granary's equipment situated on the pier—a part of the real estate. In sum, petitioner's injury was attributable neither to the ship nor to her equipment, but to a kind of shore-based machinery with which he worked every day and which was never used by seamen.

It is anomalous, of course, to speak of the "seaworthiness" of a shoreside crane or "marine leg" which is part of the real estate and never did or could go to sea. It would be equally anomalous to hold the shipowner's representation and warranty of the seaworthiness of a vessel for a voyage to include such machinery forming part of the real estate which never was or could be the equipment of a ship.

We submit that there is no support in policy or practical need for such an extension, which would render liable a shipowner who has provided his seamen and those who stand in their place with a perfectly seaworthy vessel and has fitted her safely with all the necessary or useful equipment carried by a ship. Since the shipowner's liability under such an extension would depend upon chance, and not upon any fault of his, or any defect or shortage in his equipment, there would be little opportunity for a rational apportionment of his loss. Compare *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 96. The

responsibility for defects in such shore equipment should be on those who own and maintain it, not upon the shipowner whose only connection with the machinery is the fact that it is his vessel which is being unloaded at the time it breaks down.

Nor does the existing law leave petitioner without adequate remedies. Under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*), he had a right to compensation and medical care from his employer without regard to fault—and this right is more generous than that provided by most state workmen's compensation acts. He may also have had an election to seek state workmen's compensation benefits.[23] In addition to such remedies against his employer, petitioner probably had an action in negligence against Continental Grain Co. for the defect in the granary's equipment,[24] as well as the negligence count against the shipowner. Few workers on land or sea have comparable rights for injuries sustained in the course of their employment.[25] There is, therefore, no need to create the anomaly of a ship's warranty of the seaworthiness of shore equipment which does not go to sea.

There is no valid distinction between the "marine leg" and other types of shore equipment which are

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[23] See *e.g.*, *Davis* v. *Department of Labor*, 317 U.S. 249.

[24] Since petitioner chose not to pursue this remedy, the district court did not find it necessary to determine whether the granary was in fact negligent.

[25] Seamen must show negligence or the unseaworthiness of ship's equipment in order to receive anything more than maintenance and cure. Most land workers have only the rights granted them by the state workmen's compensation acts.

not used as a part of a ship's gear. If the warranty of seaworthiness were extended to include the "leg," logic would require its extension to trucks and giant cranes, and other types of shore equipment whose only connection with the sea is their use in unloading vessels. Petitioner and the dissent below would have the warranty of seaworthiness apply to all equipment having "a practical and reasonable relation to the maritime service" (Pet. Brief, pp. 18–19), and all equipment used in loading or unloading vessels (R. 107–108). In this connection, petitioner points out that the locus of the injury to a man working on a dock or on shore does not prevent suit for breach of the warranty of seaworthiness (Pet. Brief, pp. 20–21). *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555 (C.A. 2), certiorari denied, 341 U.S. 904; see also 46 U.S.C. 740. It would follow that a longshoreman injured on the dock (or the street) by a truck carrying cargo off a vessel would have a claim for the "unseaworthiness" of the truck. This cannot be the law.

As both petitioner and Chief Judge Sobeloff concede, it does not matter that the part of the "marine leg" which broke was partially lowered into the vessel (Pet. Brief, pp. 19–21; R. 108). If the vessel warrants the seaworthiness of the "leg" (although part of the real estate) as a part of her equipment, the warranty must apply to the entire "leg."[28] Petitioner has asserted no adequate reasons for extending the ship's warranty of seaworthiness to the kind of equipment which is not now and never

[28] See *Latus* v. *United States*, 277 F. 2d 264, 266 (C.A. 2), certiorari denied, 364 U.S. 827.

has been the equipment of a ship, and we can find none.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1961.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

In Admiralty. No. 7818

WILLIAM J. ROPER, LIBELANT

v.

UNITED STATES OF AMERICA, RESPONDENT

v.

CONTINENTAL GRAIN COMPANY, RESPONDENT-IMPLEADED

v.

ATLANTIC & GULF STEVEDORES, INC., RESPONDENT-IMPLEADED

ORDER

On motion of the respondent, the United States of America, for leave to file an amended answer to allegedly conform to the proof, it is ordered that leave is hereby granted to file said amended answer and that the said amended answer be, and the same hereby is filed; the right being granted to libelant and respondents-impleaded to present further evidence, touching upon the issues raised by the amended answer, if said request for further hearing be made within fifteen (15) days from this date.

Entered at Norfolk, Virginia, this 30th day of April, 1958.

S/ WALTER E. HOFFMAN,
United States District Judge.

We ask for this:

S/ JOHN M. HOLLIS,
Assistant U.S. Attorney.

Seen and Objected to:

SIDNEY H. KELSEY,
S/by L. DAVID LINDAUER,
Counsel for William J. Roper.

Seen:

S/ JACK E. GREER,
Counsel for Continental Grain Co.

Seen:

S/ WILLIAM B. ELEY,
Counsel for Atlantic & Gulf Stevedores, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

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WILLIAM J. ROPER, LIBELANT

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UNITED STATES OF AMERICA, RESPONDENT

v.

CONTINENTAL GRAIN COMPANY, RESPONDENT-IMPLEADED

v.

ATLANTIC & GULF STEVEDORES, INC., RESPONDENT-IMPLEADED

AMENDED ANSWER OF RESPONDENT

Strike paragraph 3 of the Answer and in lieu thereof substitute the following:

3. As to paragraph number 3, respondent admits that it is the owner of the SS HARRY LANE, but denies that she was being sailed as a cargo vessel, and further adds that the SS HARRY LANE was a dead, deactivated vessel of the James River Reserve Fleet, incapable of navigation, employed as a grain depository.

(Sgd.) ----------,
United States Attorney.

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